TERRITORIAL SEA AND CONTIGUOUS ZONE EXTENSION ACT OF 1988

HEARING

BEFORE THE

SUBCOMMITTEE ON OCEANOGRAPHY

OF THE

COMMITTEE ON MERCHANT MARINE AND FISHERIES HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 5069

A BILL TO ESTABLISH A 12-MILE TERRITORIAL SEA AND A 24-MILE CONTIGUOUS ZONE, TO ESTABLISH THE NATIONAL OCEANS POLICY COMMISSION, AND FOR OTHER PURPOSES

AUGUST 10, 1988

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TERRITORIAL SEA AND CONTIGUOUS ZONE EXTENSION ACT OF 1988

WEDNESDAY, AUGUST 10, 1988

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OCEANOGRAPHY,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:19 a.m., in room 1334, Longworth House Office Building, Hon. Mike Lowry (chairman of the subcommittee) presiding.

Present: Representatives Lowry, Tallon, Shumway, Schneider, and Saxton.

Staff present: Kurt Marshall, Jan Chisolm, Nancy Tyson, Larry Flick, Lisa Pittman, and Joan Bondareff.

STATEMENT OF HON. MIKE LOWRY, CHAIRMAN, SUBCOMMITTEE ON OCEANOGRAPHY

Mr. LOWRY. We will call the hearing to order, please. I would like to thank everyone for coming. We apologize for this vote which took 20 minutes and caused us to be late.

The Subcommittee on Oceanography, this morning, is holding a hearing on H.R. 5069. The purpose of the legislation is to extend the territorial sea from the existing 3 miles to 12 miles, and the contiguous zone from its existing 12 miles to 24 miles, primarily for the purposes of national security and for the purposes of helping our agencies enforce our laws on drugs and customs.

The legislation also has embodied in it a Commission with a specific procedure and schedule to analyze and make recommendations to the Congress and the Administration with respect to whether the extensions of the territorial seas and the contiguous zone would apply to domestic law and how that will be accomplished.

We certainly appreciate the distinguished witnesses and panels we have before us today to address, I think, a very important topic.

We thank them for coming.

I would like to ask unanimous consent that my full statement be entered into the record.

[The prepared statement of Mr. Lowry follows:]

STATEMENT BY THE HONORABLE MIKE LOWRY (D-WA)
REGARDING H.R. 5069, LEGISLATION
TO EXTEND THE TERRITORIAL SEA
AND THE CONTIGUOUS ZONE OF THE UNITED STATES

August 10, 1988

Today the Subcommittee on Oceanography will hear testimony regarding H.R. 5069, legislation which I introduced on July 14, 1988, that would extend the territorial sea of the United States from three miles to twelve miles, and would extend the contiguous zone from its current twelve miles to twenty-four miles. The legislation would also establish a commission, with a specific procedure and schedule to follow, to analyze and make recommendations to the Congress and the Administration with respect to whether these extensions should apply to domestic law, and which statutes should be amended to reflect these changes.

One of the main reasons for introducing this legislation is that of national security. The opaqueness of the oceans is an important attribute which diminishes the detectability of submarines and, therefore, is a significant factor as part of our nuclear deterrent. By moving our territorial sea from three miles to twelve miles, the ability of Soviet ships to monitor and detect the movement of U.S. submarines is lessened. From this perspective, I believe that this legislation is extremely important.

This legislation also would bring the U.S. position into conformance with emerging customary international law; and the Convention on the Law of the Sea. I realize that the U.S. is not a party of the Convention on Law of the Sea, however there are currently only twelve nations which continue to recognize a three mile territorial sea as compared to a twelve mile territorial sea which is otherwise recognized worldwide. From an international law perspective, I believe that it makes good sense to establish a twelve-mile territorial sea and a twenty-four-mile contiguous zone consistent with customary international law.

Although I will want to pursue some questions with the Coast Guard on this matter, it is generally my understanding that, coupled with legislation, extending the contiguous zone from twelve to twenty-four miles would allow the Coast Guard to board a foreign-flag vessel out to twenty-four miles, without seeking the consent of the foreign-flag nation, which is currently required beyond twelve miles. This most beneficial aspect of the legislation would clearly enhance our nation's drug enforcement ability and authority.

H.R. 5069 would make very clear that this new assertion of U.S. jurisdiction would only apply for international purposes. The legislation would establish a National Ocean Policy Commission which would be responsible for developing a national ocean policy and for developing recommendations to the Administration and the Congress with respect to precisely which domestic statutes should

be amended to reflect appropriate changes in the State-Federal relationship. The commission would have two years to develop these recommendations, during which the status quo with respect to domestic law would be maintained.

I understand that the Administration is considering whether to issue a Presidential Proclamation which would extend both the territorial sea and the contiguous zone in a similar manner. Although I agree with the content that such a Proclamation would contain, I am concerned with the uncertainty that would be created regarding domestic law, specifically, the State-Federal relationship in the three to twelve-mile zone. I am particularly concerned with this question because this relationship is so vital in terms of fisheries, oil and gas, minerals and other resources.

I hope to address some of these concerns today with questions that I have previously mentioned to the witnesses in their invitations to testify here today. Specifically, I would like the witnesses to respond to these questions:

(1) What effect will the assertion of a 12-mile territorial sea have on the state-federal relationship with respect to (a) resource management authority; and (b) potential revenues from these resources?

(2) Would the assertion of a 12-mile territorial sea and a 24-mile contiguous zone be consistent with international law and U.S. policy?

(3) Should the U.S. assert a new territorial sea by Presidential Proclamation or by legislation, and what are the advantages and disadvantages of each approach?

I also have additional legal issues that I understand our last two witnesses are prepared to cover, including:

(1) the authority of the President to proclaim a territorial sea and contiguous zone;

(2) the authority and the role of the Congress in the process;

(3) the extent to which this proposed extension is consistent with customary international law and the Convention on the Law of the Sea; and

(4) the extent to which a proclamation, alone, can preserve the status quo with respect to domestic law.

I believe that this legislation represents an important step in our nation's development and wise use of ocean and coastal resources. I am confident that our witnesses today will be able to provide us with some insight as to what the Administration is contemplating, and how this squares with both international and domestic law expectations.

I will now defer to our Ranking Minority Member, Mr. Shumway.

Mr. LOWRY. I would like to call on Mr. Shumway, the Subcommittee Ranking Member, for any opening statement he may have.

STATEMENT OF HON. NORMAN D. SHUMWAY, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. SHUMWAY. Thank you, Mr. Chairman.

I would like to join with you in welcoming this panel of witnesses this morning and commend you for scheduling today's hearing on this important proposal.

As we will no doubt hear in today's testimony, the national security reasons for making this change, which is consistent with international law, are compelling. I remember some months ago when I was in Honolulu, and after touring Pearl Harbor I was amazed to note standing three miles just off the shore were two or three Soviet ships who were permanently anchored there to monitor all of our comings and goings in that very important naval base. When I found that they can do that whereas we cannot do it off their coast because they recognize the 12-mile limit, I realized that internationally we really are at a disadvantage. So I welcome this change.

I reviewed your legislation, Mr. Chairman, and I haven't made a decision in my mind as to what the preferred course of action would be—whether this change in the territorial sea limit should be made legislatively or by executive action. I do, however, strongly believe that extending our territorial sea should only be done for international purposes, not for domestic purposes. Whether this change is made by legislation or by executive action, I think it should be made clear in either case that there is no indication for a need to extend the territorial sea for domestic purposes.

It is for that reason, Mr. Chairman, that I am concerned with your proposal that a National Ocean Policy Commission be formed to review this matter and make a recommendation to Congress for domestic purposes. I don't think there is any connection at all between doing this domestically and what we are doing now in an international sense. The national security reasons that are driving the interests of the Department of Defense and Department of State in this proposal really have nothing to do with such matters with the Submerged Lands Act, the Outer Continental Shelf Management Act, the Coastal Zone Management Act, and others.

I don't believe coastal States should use these international objectives as an excuse to extend their jurisdictions to control fishing activities or oil and gas leasing out to 12 miles along their coasts.

Mr. Chairman, again I thank you for your leadership on this issue. I look forward to hearing from today's witnesses.

Mr. LOWRY. I thank you for that opening statement.

Are there any other opening statements this morning?

Mr. SHUMWAY. Mr. Chairman, I would ask unanimous consent that the opening statements of Congressman Davis and Congressman Saxton be included at this point.

Mr. LOWRY. Without objection, those statements will be included in the record.

[The prepared statements of Messrs. Davis and Saxton follow:]

STATEMENT OF HON. ROBERT W. DAVIS, A U.S. REPRESENTATIVE FROM MICHIGAN

It seems inevitable that the United States will soon enlarge its sovereignty by claiming a new territorial sea and contiguous zone—either through Mr. Lowry's bill or by an executive proclamation by President Reagan. The establishment of an expanded territorial sea may well have serious implications for many coastal states, although, of course, the Great Lakes states will not be affected. This Committee, as well as the myriad Federal agencies which administer statutes which apply to our territorial sea and contiguous zone, will have some difficult decisions ahead, as we reexamine the balance of Federal and State interests in this new territory.

It is my hope that these very important decisions—perhaps the most significant ones facing this Committee—will be confronted in an orderly and deliberate manner.

STATEMENT OF HON. H. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY

Good morning and thank you Chairman Lowry for calling what I believe may end up being one of the most significant hearings we have held in this Congress. You have taken a bold, but I believe important step in introducing the legislation before us today. This is an extraordinarily complicated issue and one on which your leadership is welcome and needed.

The extension of our territorial sea to 12 miles could benefit the Nation in many ways—including, of course, the removal of a clear disadvantage to our Nation's submarine forces—but such a decision also carries with it the possibility of enormous economic and environmental changes as well. Are we ready to deal with these changes in a reasonable manor? Do we even understand just what they may be? One "simple" example, of the complexity of such a decision, and another on which we are indebted to Chairman Lowry for his leadership, is in the interpretation and implementation of the Coastal Zone Management Act. Would the consistency clauses so critical to its proper implementation apply out to 12-miles? If so, such a change in our territorial seas holds the potential for great environmental benefit.

I understand, however, that there are other possible problems, for example with the Endangered Species Act, that may counter the purported benefits. A balanced understanding of these costs and benefits is what we hope to gain from today's hearing. Since we are likely to be involved for the next decade in related legislation, we all are most interested to hear what our witnesses have to say.

Thank you Mr. Chairman.

Mr. LOWRY. Our first panel consists of Mr. Edward Wolfe, Deputy Assistant Secretary of State, U.S. Department of State; David E. Wigg, Deputy Assistant Secretary of Defense; Mr. Mike Poling, Deputy Assistant Secretary, Land and Minerals Management, U.S. Department of Interior; Rear Admiral Joseph Vorbach, Chief Counsel, U.S. Coast Guard; and Mr. Timothy Keeney, General Counsel for NOAA.

I want to thank you all very much for joining us. I believe if it is in agreement with you, we will just go right down the witness list as I read it and start with Mr. Wolfe.

STATEMENT OF EDWARD E. WOLFE, DEPUTY ASSISTANT SECRETARY OF STATE FOR OCEANS AND FISHERIES AFFAIRS

Mr. WOLFE. Thank you, Mr. Lowry.

If I may, I would like to summarize my statement and submit the entire statement for the record.

Mr. LOWRY. Thank you.

Mr. WOLFE. I've appeared before you three times, Mr. Lowry, during the past two months. So I'm sure you are tired of seeing my face out here. I will try to be as brief as possible and then open up the floor to questions after everyone has testified.

It is a pleasure to be here today to present the department's views on H.R. 5069. As the Interagency Group on Law of the Sea

and Oceans Policy has been examining this summer the question of extension of the territorial sea and contiguous zone, we believe that this hearing is very timely and would like to thank you for offering us this opportunity.

Extension of the territorial sea from 3 to 12 nautical miles and the contiguous zone from 12 to 24 miles would benefit the United States. This extension would immediately, and I underline "immediately", enhance the national security of the United States and could enhance our drug enforcement efforts.

The question before us is how best to achieve and maximize the benefit or benefits of this extension. We recognize that extension of the territorial sea will undoubtedly raise a number of difficult issues. It seems to me that we have the same common objective and national security concerns, at least that is our understanding. We need to address together mechanisms to reach our objective, and I think that is why we are here today.

As I said, this extension will raise a number of difficult issues. Nevertheless, we do not believe the United States should be denied the benefits of extending the territorial sea simply because it will cause us hard work and difficult decisions.

The Administration appreciates the importance of this issue recognized by the introduction of your bill and by this hearing today, and of course we look forward to working with you and your colleagues to achieve the full benefits of a 12-mile territorial sea for the American people.

As the subcommittee is aware, the territorial sea is a belt of water adjacent to the coast of a nation over which it exercises sovereignty. Beyond the territorial sea is a further jurisdictional belt known as the contiguous zone in which the coastal nation may exercise the control necessary to prevent and punish violations within its territory or territorial sea of its customs, fiscal, immigration, or sanitary laws and regulations.

The United States has had a three nautical mile territorial sea since Thomas Jefferson asserted this in the late 1700's. It also claims, as you know, a nine-mile contiguous zone beyond the territorial sea. These limits were once the international norm. I do not believe that this is the case any more today.

Under customary law, as reflected in the 1982 U.N. Convention on the Law of the Sea, a coastal nation may claim a territorial sea up to 12 nautical miles in breadth and a contiguous zone not to exceed 24 nautical miles from the baseline from which the territorial sea is measured.

At present 104 coastal nations, including most of our allies with the exception, I believe, of West Germany, claim 12-mile wide territorial sea. As the navigation provisions of the Convention, including those pertaining to transit passage through international straits and archipelagic sealanes passage, are now regarded as customary law, the Executive Branch believes it is time[ly] that the United States proclaim a 12 nautical mile wide territorial sea and 24 nautical mile wide contiguous zone.

Extension would bring the United States into conformity with the prevailing international legal practice of the majority of coastal nations. It would significantly enhance our national security interests, primarily by preventing foreign vessels from stationing them-

selves within 12 miles to gather intelligence and by confining their activities in the 12-mile territorial sea to the exercise of the right of innocent passage, and where applicable, of straits transit passage.

Moreover, foreign military aircraft would be precluded from overflight within 12 nautical miles of our coasts and foreign submarines would be restricted to navigation on the surface.

Both the Congress and the Executive Branch have important roles to play in the extension of the territorial sea. The Interagency Group on Law of the Sea and Ocean Policy is now drafting a Presidential Proclamation to extend the territorial sea.

Extension of the territorial sea is essentially, as we see it, an exercise of an international claim of right vis-a-vis other nations. Congressional action could be helpful in minimizing the domestic uncertainties that might be raised by that extension under a myriad of existing statutes. This might avoid needless litigation.

It may be desirable to enact legislation based upon the extension of the territorial sea and clarifying that the legal rights and interests of the States are not extended and that Federal agencies' authorities are unchanged. Legislation complementing the Proclamation should state that, except as provided in subsequent legislation, the extension does not affect existing statutory or regulatory authorities that refer to the U.S. "territorial waters", "territorial sea", or "navigable waters" and that these would continue to be interpreted and to be applied to mean three nautical miles in breadth.

We have listed in our testimony, Mr. Chairman, some of the concerns we have with H.R. 5069. I will not bring all of these to your attention because they are in the testimony, but if I may point out one or two very briefly.

Any extension should refer not only to the right of innocent passage through the territorial sea for foreign vessels as your bill does, but also the right of transit passage through international straits.

A second concern is that portion of your bill which addresses the baselines from which the territorial sea is measured. We believe this provision is unnecessary. We have baselines and procedures for their determination alteration and publication which are firmly established in our Government's administrative practice and sanctioned time after time by the Supreme Court. This is not an area in which legislation is required.

With regard to the establishment of a National Ocean Policy Commission, I have testified before this committee at least two times before, maybe three times, not supporting this particular piece of legislation. I would say again that the Department of State at this point in time believes that the commission would be unnecessary and duplicative of existing efforts. The commission set out in the bill is charged with a mandate so broad, in our opinion, that it could retard this Nation's realization of the full benefits of extension of the territorial sea and the contiguous zone.

The principal group charged with overseeing the implementation of our international oceans policy has been the SIG, or the Senior Interagency Group on the Law of the Sea and Oceans Policy, chaired by the Secretary of State.

Of course, there are also other groups that have an advisory role, and I would certainly refer to Interior and the Outer Continental Shelf Advisory Committee, and Commerce's Fisheries Management Councils, and other such bodies.

I believe that most of these bodies have longstanding mechanisms to provide avenues for the public and the States to influence oceans policy.

Finally, Mr. Chairman, I would just say that we strongly desire a cooperative bipartisan approach to extension of the territorial sea and the contiguous zone. It is our intention to work towards a Presidential Proclamation in the near future consistent with the objective of preserving the status quo with respect to domestic legislation unless such legislative authorities are modified in the future. We are prepared to continue to cooperate with Congress to achieve this end.

I would just say, not as part of my formal remarks, but I certainly would like them submitted for the record, that we consider the extension to be a foreign relations function and therefore an appropriate subject of Executive action. Having said this, we would like to work with you, we would like to work with the Congress toward a bipartisan approach to realizing the full benefits of such an extension for the American people.

My point would be, let's not study this to death; let's take definitive action, action that is in the best interest of the United States. We believe that action should be immediate. Let's try to obtain maximum benefit with the least amount of cost.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Wolfe can be found at end of hearing.]

Mr. LOWRY. Thank you, Mr. Wolfe.

Mr. Wigg.

STATEMENT OF DAVID G. WIGG, DEPUTY ASSISTANT SECRETARY OF DEFENSE, POLICY ANALYSIS

Mr. WIGG. Thank you, Mr. Chairman.

First, I would like to thank you and the subcommittee for inviting the Department of Defense to present our views on H.R. 5069, a bill to extend the territorial sea and contiguous zone to 12 and 24 miles, respectively, and to establish a National Oceans Policy Commission.

I would ask that my written testimony be entered into the record and I will merely summarize the views.

Mr. LOWRY. Without objection, so ordered. Thank you.

Mr. WIGG. First of all, I would like to introduce the gentleman seated behind me, Captain William Shackty, who is the Pentagon legal expert. As a non-lawyer, I appreciate his presence.

The Department of Defense strongly supports the extension of both the territorial sea and contiguous zone to 12 and 24 miles, respectively. With the success of the 1982 U.N. Convention on the Law of the Sea and subsequent demonstrated multilateral recognition of the principles of freedom of navigation and the rights of innocent passage and transit passage, the United States can now join the 104 other nations who have extended these boundaries and in

doing so improve our maritime mobility and further protect our coasts.

The Department of Defense foresees significant national security advantages to this action. Foreign vessels will no longer be able to gather intelligence in the 3 to 12 nautical mile area off sensitive U.S. military installations and ports used by naval vessels. Pushing foreign intelligence vessels back another nine miles will significantly improve the ability of our naval vessels to operate relatively free of foreign intelligence.

For example, essential to the operation of the submarine fleet are two factors: the ability to move in and out of port without detection primarily by Soviet intelligence collection vessels, or AGI's, loitering off our shores; and the denial of collection of acoustic intelligence. Operating within a 12 nautical mile belt will greatly improve our ability to evade detection.

According to the Director of Naval Intelligence, Admiral Brooks, the proposed expansion would permit a better application of operational security plans and policies and improve the Navy's security and operational effectiveness. It will also impair the efficiency of foreign intelligence gathering in general, including photo intelligence and line of sight communication intercepts to the benefit of America's national security interest.

DOD believes that the proposed expansion can best be effected by presidential proclamation with no change in the status quo of existing statutes unless addressed by Congress in the future. We do recognize, however, that the effect of said proclamation on Federal/State relationships is an important issue, and it is currently under study within the Executive Interagency Working Group.

It would appear that for certain domestic questions as well as to reduce uncertainty during the interim period after a presidential proclamation, that legislation to retain the status quo might be beneficial.

With regard to Title II of H.R. 5069, the Administration unanimously agrees that creation of the National Oceans Policy Commission is unnecessary, and we are satisfied that existing executive entities working with Congress can handle issues as they arise.

That concludes my statement, Mr. Chairman.

[The prepared statement of Mr. Wigg can be found at end of hearing.]

Mr. LOWRY. Thank you very much, Mr. Wigg.

Mr. Poling.

STATEMENT OF MICHAEL A. POLING, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR

Mr. POLING. Thank you very much, Mr. Chairman.

I appreciate the opportunity to be here this morning to present the Department of the Interior's testimony on H.R. 5069. I have a brief statement that I would like to submit for the record, Mr. Chairman, and with your permission I will summarize my remarks and respond to any questions that you or the members might have.

Mr. LOWRY. Without objection so ordered. Thank you.

Mr. POLING. Mr. Chairman, the Department of the Interior supports the concept of extending the territorial sea from 3 to 12 nautical miles and the contiguous zone from 12 to 24 miles. These extensions will enhance our national security and could enhance our ability to interdict illegal drug trafficking.

In our view, however, Mr. Chairman, Section 104(a) of the bill lacks sufficient clarity with respect to scope and intent. It should explicitly state that all provisions of existing domestic law, both Federal and State, will continue to be administered as they are now. Section 104 should not operate to extend the application of domestic statutes to the newly expanded territorial sea area.

With respect to Title II, of the proposed legislation, Mr. Chairman, we oppose the establishment of the National Oceans Policy Commission. It is our view that existing statutes provide us with an effective and comprehensive oceans policy that has served us well.

As Mr. Wolfe testified, the Commission would be duplicative of existing mechanisms, principally the Senior Interagency Group on Law of the Sea and Oceans Policy.

In addition, we are concerned about the composition of the Commission as provided in Section 201 of the proposed legislation. We believe that the President should have the authority to make appointments without being constrained by lists provided by Congress.

We also believe that the disproportionately low representation of Federal and State officials on the Commission will not allow for the development of a balanced oceans policy. Importantly, the Commission does not have representation from Federal agencies with an interest in oceans policy. The Departments of the Interior, Transportation, Defense, State, and Commerce, as well as the Environmental Protection Agency, are not included.

Finally, Mr. Chairman, we believe that the Commission ought to be subject to administrative procedures and regulations that protect against waste, fraud, and abuse by requiring that meetings be held in public, that public hearings be held, and that public comments be solicited.

This concludes my summary, Mr. Chairman. I would be pleased to respond to any questions.

[The prepared statement of Mr. Poling can be found at end of hearing.]

Mr. LOWRY. Thank you very much, Mr. Poling.

Admiral Vorbach.

STATEMENT OF REAR ADM. JOSEPH EDWARD VORBACH, CHIEF COUNSEL, U.S. COAST GUARD

Admiral VORBACH. Thank you, Mr. Chairman, members of the subcommittee. I appreciate the opportunity to submit this statement for the record, and I would ask, as others have, to briefly summarize my remarks.

Mr. LOWRY. Without objection so ordered. Thank you.

Admiral VORBACH. The Coast Guard generally supports expansion of the territorial sea from 3 to 12 nautical miles, and the contiguous zone from 12 to 24 nautical miles.

Under customary international law, as reflected in the 1982 Convention on the Law of the Sea, every coastal State has the right to establish a territorial sea out to a maximum distance of 12 nautical miles from its baseline, and a contiguous zone out to a maximum of 24 miles from such baselines. The international community has demonstrated an acceptance of territorial sea and contiguous zone claims out to these maximum limits which have become the acknowledged international norm.

An extension of the territorial sea to 12 miles would have a direct immediate benefit to vital national security interests of the United States by restricting foreign surveillance activities to areas outside 12 miles of the U.S. coast. This action would provide broader authority for United States forces to restrict such activities under international law. The Coast Guard, as an armed force of the United States with specific coastal defense responsibilities during both peace and hostile times, has a direct interest in such an enhancement of national security.

In accordance with current Federal law, the Coast Guard is also involved with and responsible for a multitude of ocean-related activities which take place in the territorial sea and contiguous zone. These taskings include navigation, maritime safety, law enforcement, and the protection of the marine environment.

An expansion of the territorial sea and contiguous zone could have a substantial and significant impact on the operations and regulatory authority of the Coast Guard, depending on the specific effect of such an expansion on each of the laws which the Coast Guard enforces.

For example, with regard to our waterways safety regulatory authority, we would generally be able to require vessels to use a traffic separation scheme or operate in a specific manner out to 12 miles of the coast if this domestic authority were effected; whereas we are presently limited to three miles.

On the other hand, there would be no significant increase in the Coast Guard's jurisdiction to enforce drug interdiction laws by expanding the territorial sea or contiguous zone because the general law enforcement authority of the Coast Guard is not tied to statutory definitions of maritime limits or "customs waters" per se. Instead, our authority extends to the "high seas" and waters over which the United States has jurisdiction.

The Interagency Working Group on Law of the Sea and Ocean Policy is currently drafting a presidential proclamation to expand the maritime limits of the United States and is working with the Department of Justice to resolve underlying legal issues.

It is not entirely clear what effect H.R. 5069 would have on domestic law. Section 104, titled "Effect on Other Laws", proscribes the effect on State law and international agreements but does not specifically address the effect on Federal law. For the sake of clarification, the bill should be more specific regarding its effect on Federal law. The bill could state that this extension of the territorial sea and contiguous zone is not meant to affect domestic law.

As to the other domestic law authorities that could be affected by an expansion of the territorial sea and contiguous zone, we defer to those agencies affected.

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My comments concerning the provisions of the bill relating to the Ocean Policy Committee are contained in my written statement.

This concludes my statement for the record on H.R. 5069. I appreciate the opportunity to present these views for your consideration, and will undertake to answer any questions you may have.

[The prepared statement of Admiral Vorbach can be found at end of hearing.]

Mr. LOWRY. Thank you, Admiral Vorbach.

Mr. Keeney.

STATEMENT OF TIMOTHY R.E. KEENEY, GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. KEENEY. Thank you, Mr. Chairman.

I appreciate having the opportunity to present the views of the Department of Commerce on H.R. 5069. Because other Administration witnesses are testifying today, with your permission, I will simply summarize the views of the department.

I also defer to the Departments of State and Defense on questions relating to attributes of a territorial sea under international law, and to the Department of Justice on general legal implications of a presidential proclamation and the proposed legislation.

The purposes of H.R. 5069 are to extend, for purposes of international law, foreign affairs and national security, the United States territorial sea from 3 miles to 12 miles, and the U.S. contiguous zone from 12 miles to 24 miles; and to establish a National Oceans Policy Commission to conduct a comprehensive review of existing laws and to consider a number of ocean policy issues, in order to propose amending legislation relating to the territorial sea and contiguous zone extensions and to develop and propose to the Congress and the President a national oceans policy.

The Department of Commerce supports the extension of U.S. sovereignty and jurisdiction for international and national security purposes. It is our view that a 12-mile U.S. territorial sea is consistent with U.S. policy as stated in the President's 1983 Proclamation of a U.S. Exclusive Economic Zone and the accompanying Ocean Policy Statement, and that a territorial sea for international and national security purposes can be asserted consistent with recognized international law.

NOAA is part of the Interagency Group on Law of the Sea and Ocean Policy which is currently drafting a proclamation extending the territorial sea. We are participating in consultations with the Justice Department to resolve a number of underlying legal issues.

In this context, we support the proposition that the action extending these areas should itself leave unaffected those existing U.S. statutes that relate to the extended areas. We do not support the bill as proposed because we believe it contains provisions beyond those necessary to accomplish these purposes.

The National Oceanic and Atmospheric Administration administers several laws relating to the areas in question. These include the Magnuson Fishery Conservation and Management Act, the Coastal Zone Management Act, the Marine Mammal Protection

Act, the Endangered Species Act, the Marine Sanctuaries Act, and the Ocean Thermal Energy Conservation Act.

We presently are reviewing the laws that we administer in order to determine the relationship between implementation of these laws and the proposed extension of U.S. sovereignty and jurisdiction.

We believe in the interest of clarity that any action extending U.S. sovereignty and jurisdiction should leave the current jurisdictional scope and operations of those laws unaffected.

With respect to the establishment of a National Oceans Policy Commission, we believe that the Executive Branch, through the various existing interagency arrangements which we have detailed in past testimony on this subject, and the Congress, through its committee legislative and oversight functions, already have available the mechanisms needed to address the wide array of ocean policy issues identified in H.R. 5069.

Also the consideration of those issues is not necessary for purposes of extending U.S. sovereignty and jurisdiction as proposed. We strongly oppose the establishment of the National Oceans Policy Commission.

Thank you, Mr. Chairman. This concludes my prepared statement. I would be happy to respond to any questions the subcommittee may have.

Mr. LOWRY. Thank you, Mr. Keeney.

We would like to thank all the panel members for offering some specific perfecting amendments. I am going to ask the staff to work with you and your agencies. I think you have made a lot of good suggestions that we can work in when we have a markup, and of course there are a couple of policy questions I would like to talk about.

Thank you very much.

We will recess for ten minutes for this vote and then return. Then we will return to some questions. Thank you.

[Recess.]

Mr. LOWRY. I would like to reconvene the hearing.

Again, as I said when we left for this vote, I appreciate very much the testimony and also for offering some perfecting amendments, to straighten out any problems that you have identified in the legislation. And again, I will ask our staff to work with you to get that straight because we certainly, if we do have a markup on this, which I suspect we will be having in the near future, would like to have the best possible legislation.

The question I would like to ask first, to you, Mr. Wolfe, but obviously to anybody on the panel may respond to, is the question of the need for legislation. I compliment the Administration for moving ahead. It makes emminent sense to me from the national security standpoint that this is a policy that makes sense.

We introduced the legislation because we felt that perhaps there would be problems arising, that without legislation addressing the needed changes in law, that a Proclamation simply could not address. So, Mr. Wolfe, I guess first you, but I would invite comments from anybody else, as to the specific question of the need for legislation and what that should address relative to the Proclamation.

Mr. WOLFE. Thank you, Mr. Chairman. I am sure almost everyone on the panel will have a response to that. So I will be as brief as possible and would be happy to submit a more thorough response to that question for the record as we meet with the staff to work together and, hopefully, reach an accord on the issue.

Mr. LOWRY. Thank you.

Mr. WOLFE. So I will move forward if that is acceptable. We believe, as I said in my statement, that a Proclamation should indeed be issued by the Executive Branch.

With regard to your question, the need for legislation, I think somewhere down the road or possibly concurrently with a Presidential Proclamation legislation could be useful. Let me amplify that.

We also think that for now we should issue this Proclamation on the Executive side for the national security reasons and others that I mentioned in my testimony, and at the same time maintain the status quo on the remaining issues that we all agree will be outstanding and probably we will have differences on. We will work on those together. We don't think we need an Oceans Policy Commission to do that.

We are going through a process at this point in time, an intergovernmental process of reviewing the laws, reviewing the problems. You are very well aware that the Justice Department is reviewing statutes that would potentially be affected.

I might add that I believe just in the code, just in our own law, references to "territorial sea", I am told, to describe that for the record, may be a 12-inch high pile of paper. So there is a lot of work to be done, but I think we are getting close to the point.

So Justice is reviewing these questions. We asked Justice in late May, early June, for responses to specific legal questions. We understand their answers will be forthcoming within the month. We are looking forward to those answers.

There are underlying legal issues. I won't go through all of them, but specifically with regard to territorial waters, navigable waters, territorial seas, we need to fine tune some of those questions.

Finally, I would just say the key question is, can we extend the territorial sea, the contiguous zone and preserve the status quo? Our position is, or the Department of State's position and I think the Administration's position is we can do that.

One followup: concurrent legislation. I think it would be very helpful if the Committee would consider, the Congress would consider, possibly working with us at this point in time, today, because we see this as a rather urgent matter, to consider submitting legislation reaffirming, confirming our intention to extend and maintain the status quo. We could work from that point on together.

Mr. LOWRY. Thank you for that comment, that suggestion, which to me makes a lot of sense.

Mr. WOLFE. Thank you very much.

Mr. LOWRY. Trying to move this question to a specific example of maintaining the status quo and how does a Proclamation do that, for instance, take a look at the West Coast and for instance differences on oil and gas drilling, whether it was within 3 miles or 12 miles, and differences within fishery management. I mean, you could almost say that you could take any given State and you

might find an exactly opposite viewpoint within State administrations or prevailing thoughts within those States on those two questions, the same State. They will have an opposite viewpoint.

For instance, looking at the great State of Alaska with that tremendous fishing resource up there, would the State of Alaska then say, we now want to manage out to 12 miles as opposed to the three miles, and what would the effect of that be on fishery management and the Magnuson Act and all those very important issues.

One of the reasons we introduced this legislation, in addition to going right along right with the Administration's effort for the national security reasons, was to answer the question of how do you maintain the status quo and how do you accomplish that without legislation.

Mr. WOLFE. I think very simply, Mr. Chairman, the status quo would be maintained on its own because we wouldn't suggest or propose any change, and I think it would be up to the Congress. We, the Executive Branch, would of course work with you to determine what changes would be necessary.

For example, Mr. Keeney talks in his testimony about areas of responsibility: coastal zone management, Marine Mammal Protection Act, endangered species, and marine sanctuaries. If I read his testimony correctly, there is a good chance, at least tentatively now, that many of those areas would not need changes. I cannot speak to oil and gas, the Submerged Lands Act, but I think those are areas that we can take a look at after we extend the territorial sea and the contiguous zone.

Mr. LOWRY. I meant my question more to be, what prevents the States from going to—nothing prevents them, I guess, from going to court, but successfully going to court and saying, oh, yes, but now we want to have that authority to manage fisheries for 12 miles or we want to have that authority on coastal zone management or whatever else to 12 miles. My question wasn't quite as much whether this Administration or the next Administration would not be maintaining the status quo, but what the coastal States' response would be. That's why it seemed to me congressional legislation made sense to address any uncertainty that might be there.

Mr. WOLFE. It depends, in my opinion, on the coastal State's interest. You pointed out Alaska. They would have one of the larger interests. Certainly New England, the East Coast would have a major interest also. But it would be up to the Congress to change the Magnuson Act and other statutes that were applicable.

Mr. LOWRY. Thank you.

Would any other members of the panel—yes, Mr. Poling.

Mr. POLING. Mr. Chairman, I would like to speak to that question. One of the purposes of the proclamation, as well as this legislation, is to enhance our national security. One of the things that I think is very important for the Subcommittee to keep in mind is the importance of offshore oil and gas production to national security and to energy security. Currently, 12 percent of our domestic oil and 25 percent of our domestic gas come from the Outer Continental Shelf.

As Mr. Wolfe and others have said, the Department of Justice and our own solicitors at Interior are examining the legal ramifications of the legislation. Our concern would be if the legislation were to cause any disruption in exploration, leasing, and development of these oil and gas reserves that are so vital to national security and energy security. This would be particularly acute in the western States because 30 percent of our oil and 32 percent of our natural gas lie within 12 geographic miles' of shore. In the case of California, almost 100 percent of our oil and gas lies within that 12-mile limit.

So to convey to you our concern, that is something that we would look at very carefully.

Mr. LOWRY. Thank you.

Mr. Keeney?

Mr. KEENEY. Mr. Chairman, I would just like to say that as far as the Department of Commerce is concerned, our preliminary review indicates that in general the applicability of NOAA's major authorities would not be affected by such an extension.

However, your question as to whether or not there is need for legislation, as Ambassador Wolfe said, this is a matter certainly which Commerce would like to defer to the Department of Justice, which I understand in conjunction with other agencies and departments is currently considering this question. If appropriate, no, it does not rule out the possibility of legislation, it simply maintains the status quo.

Mr. WOLFE. Speaking of the Justice Department, someone just handed me a note, Brian Hoyle of my staff, Office Director for Ocean Law and Policy. Brian points out that we are now asking the Department of Justice to put appropriate language in the Proclamation to prevent extension of existing statutes. I hope that is helpful to you.

Mr. LOWRY. Are they giving a legal opinion as to the effect of that?

Mr. WOLFE. Have they given a legal opinion? Not at this point.

Mr. LOWRY. But you have asked for a legal opinion?

Mr. WOLFE. That's correct.

Mr. LOWRY. When do you expect that?

Mr. WOLFE. As I said, we originally discussed and asked questions in late May, early June, again in late June and at the beginning of July, of the Justice Department, specific legal questions. I am told, that within the month they hope to be back to us with some definitive responses.

Mr. LOWRY. So, fairly soon now?

Mr. WOLFE. I hope so.

Mr. LOWRY. Hopefully, right after we return from this recess perhaps we could really be in a position with this information.

Mr. WOLFE. We are looking forward to their reply.

Mr. LOWRY. Great. Thank you.

Any further comments on that general question of legislation?

[No response.]

Mr. LOWRY. Thank you.

Admiral Vorbach, just one more specific question. I was of the understanding that the Coast Guard had previously said that under present legislation customs enforcement authority is four

marine leagues, 12 miles, and that needed to extended to eight marine leagues for drug enforcement purposes. If I could just extend a little further on that, we had the boarding of a ship not too long ago off the State of Washington, a very good job done by the Coast Guard. I'm almost sure what happened was the permission or the notification was given by that country's particular State agencies, their embassy or whoever it was, to be able to do that. That beyond the four marine leagues, that the Coast Guard would need to get that permission under the existing law. Do I misunderstand that?

Admiral VORBACH. Mr. Chairman, there are a myriad of statutes that operate in this area. The general application of the Coast Guard's jurisdiction on the high seas and waters under U.S. jurisdiction comes in 14 U.S.C. 89, and we have authority to board U.S. vessels anywhere on the high seas, and foreign vessels within the territorial seas, on the high seas with permission, and under other limited circumstances.

The permission that we sought was consistent with that. We have some agreements with some governments, but we have a sort of continuing authority to do that.

Mr. LOWRY. Yes. I think you did clarify it the way—that was the way I did understand it then. I didn't hear your first statement correctly then.

Admiral VORBACH. Now back to the customs waters, the customs waters are defined in statutes as the four marine leagues and 12 miles. The legislation would be required to extend the customs waters but that does not affect our Coast Guard authority to board vessels, as I have just described, under 14 U.S.C. 89. We would look at each particular statute to see where it applies, territorial sea, navigable waters of the United States, those kinds of phrases. That is what is being studied in the Interagency Group and will be examined more carefully in the future.

Mr. LOWRY. So flags of other countries would need the permission beyond the 12 miles at this point?

Admiral VORBACH. At this point, yes, sir.

Mr. LOWRY. So this would address that problem and give you a better authority. Thank you.

The gentleman from New Jersey.

Mr. SAXTON. Just two quick questions, Mr. Chairman. Thank you.

Just for a point of clarification, I think what your recommendations boil down to is that Section 104 ought to include language which makes it clear that our bill, Mr. Lowry's bill not affect existing Federal law. Is that basically what the conclusion is that you have come to?

Admiral VORBACH. That was my recommendation, Mr. Saxton. I believe that Mr. Poling also commented in the same fashion.

Just to make it clear, that with respect to the chairman's concerns of any ambiguities that may arise with respect to this action and its effect on existing law.

Mr. SAXTON. One other point relative to 5069. The bill claims sovereignty over air space above the extended territorial sea and the contiguous zone, as well as control over the seabed and subsoil. Is this different than our current practice?

Mr. WOLFE. Yes, it is. The air space we now control extends only to three miles. So it would extend out to 12. It would not include the contiguous zone, however, merely the air space out to 12 miles.

Mr. SAXTON. Thank you.

Mr. Poling, in your statement, I may not have this quote precise as you said it, but you said something to the effect that you opposed our Ocean Policy Commission because Interior feels that we have an ocean policy which has served us well. Would you care to expand on that?

Mr. POLING. I believe there are myriad statutes that govern oceans policy, and we think that any additional study by a Commission created as a result of the enactment of this legislation would be duplicative.

I think the primary point there was that a Commission would be necessary to make recommendations to the Congress and the President with respect to formulation of oceans policy. Our point is that we think that the existing statutory frameworks already supplies us with the authority to have an oceans policy.

Mr. SAXTON. I believe we do have an oceans policy and I believe we have sufficient authority to have an oceans policy, but I would just point out to you rather briefly here that for the last ten years or so we have learned an awful lot about what our policy has been and what our policy has done to the ocean. Whether you talk about pollution that we have in the Northeast, or whether you talk about the gentleman from Washington's concerns on the West Coast relative to ocean policy, those are issues that we are dealing with on a daily basis and learning about on a daily basis.

Just for the record, I think someone should say here today that our concern as expressed in this bill by the creation of an Ocean Policy Commission is to continue to shed light on the answers to questions that we are asking on a daily basis now in this committee. We don't know what the answers are to those questions nor the solutions to those problems. So, very clearly the language in this bill moves toward the creation of a commission that would make recommendations to us, in other words to put in place a group of people who have the capacity and will perform the function of making recommendations that will look to the future based on what we have done in the past to the ocean and to hopefully bring some sanity to the way we treat our nearshore and offshore waters.

Mr. POLING. I appreciate your comment.

Mr. WOLFE. Could I follow up on that, Mr. Saxton, just to make one brief point? I think we have the same purpose, we have the same intention. The Department of State's point is that not only do we have the Senior Interagency Group that deals with international oceans law and policy across the board at the State Department and other agencies, we also have the Outer Continental Shelf Advisory Group and the Fishery Management Council Groups that advise the Congress, and the respective agencies.

So my point is, there are domestic bodies already in existence to provide this information. Maybe we are not tapping it, "we" being the Executive, or maybe the Congress is not tapping these organizations the way we should. My question would be, do we want to reinvent the wheel and go through another two-year period devel-

oping a commission, having the commission study it, put 17 members on the commission? These commissions is in the bill are able to hire consultants to provide information to the commissioners who are going to come back to Congress, who are going to come back to us.

It seems like we've got the body of information here, we've got the groups. Maybe we don't have them together right, but we should start thinking about putting the collective bodies together.

Mr. SAXTON. I appreciate that also. Your position perhaps is well taken.

We find ourselves in a position now of reacting to a situation that has become very serious. We find ourselves doing things like this—Allied Chemical is the only chemical company that remains permitted to dump in the ocean. The Allied people make the point rather articulately that the product that they deposit in the ocean has no possible effect on the ocean. Yet, we find ourselves tempted and in the process of telling Allied they can't dump their hydrochloric acid in the ocean which is supposedly scientifically not harmful. We are probably going to prohibit them from doing that because Congress and the public don't sufficiently understand with the mechanisms we have in place what the effect of that chemical is in the ocean.

So what I guess we are groping for is a mechanism to help us find logical answers to the many questions that revolve around the ocean.

Let me just back up and ask a follow up question to the Admiral relative to the air space question that I asked earlier. Is this consistent, what we've proposed to do in this bill, is this consistent with international law?

Admiral VORBACH. Very definitely. The international law is most recently reflected in the 1982 Law of the Sea Convention, which provides for a 12-mile territorial sea and 24-mile contiguous zone. The principles relating to overflight and freedom of navigation that are provided in that treaty are generally regarded as customary international law.

Mr. SAXTON. Thank you very much.

Thank you, Mr. Chairman.

Mr. LOWRY. Thank you.

We have numerous other questions we would like to have answered if we can get to those in writing or in discussions with the staff. But we do appreciate for the second time—we want to move on—but we appreciate very much the panel's help and again will appreciate your working with us on coming up with a good answer to this question.

Thank you very much.

Mr. LOWRY. Our next panel is Mr. Ted Evans, Executive Director, Alaska Factory Trawler Association; Mr. Rich Delaney, Vice Chairman of the Coastal States Organization; Ms. Gayl Westerman, Professor of Law, Pace University School; and Mr. Jack Archer, Environmental Sciences Program, University of Massachusetts.

Thank you very much for joining us. We appreciate your time on this important subject. We would like to start off, if it is all right with the panel, in the order in which I read the names.

Mr. Evans.

STATEMENT OF EDWARD D. EVANS, EXECUTIVE DIRECTOR, ALASKA FACTORY TRAWLER ASSOCIATION

Mr. EVANS. Thank you, Chairman Lowry.

I am testifying on behalf of the Alaska Factory Trawler Association, the American High Seas Fisheries Association, the Fishing Vessel Owners Association, the Midwater Trawler's Cooperative, the North Pacific Fishing Vessel Owners Association, the Northwest Fisheries Association, and the Pacific Seafood Processors Association.

Mr. LOWRY. Your time is now up. [Laughter.]

Mr. EVANS. Congressman Lowry, you know these associations quite well. These are individuals and businesses that are concerned about the impact of the extension of the territorial sea on domestic law for fisheries management in the present Exclusive Economic Zone.

These organizations want the present inner boundary of the Exclusive Economic Zone to remain unchanged, even if the territorial sea is extended.

With the first rumor that the Administration might be considering the extension of the territorial sea, fishermen and processors from around the country began asking what the effect of this would be on the State/Federal fisheries management boundary. The answer that we got from D.C. was a resounding, "We don't know."

The major question before the subcommittee is whether the action is consistent with international law and U.S. policy. We will defer on that issue with the recognition that there may well be valid national security issues prompting the action.

With respect to the State/Federal resource aspect, we have gotten the impression that the domestic side of the action was more or less an after thought. Clearly, we know of no major problem which would cause such a sweeping action as to adjust State jurisdiction from the present three miles to a new 12-mile limit.

In fact, while there continue to be minor State/Federal skirmishes, the major litigation which occurred over the past two decades is now largely settled. We think that a presidential proclamation or legislation which leaves the nature and extent of the State/Federal resource jurisdiction unclear will start a new round of such controversy.

With respect to fisheries jurisdiction, our organizations have a very major concern. Most of the fishermen and processors represented by these organizations are persons who responded to the goals of the Magnuson Act "to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska." These fisheries have now been developed with investment over the past ten years approaching $1 billion.

Our fisheries which occur in the EEZ off Alaska are managed by Federal fisheries management plans. These resources occupy the present 3 to 200 mile EEZ and are rightfully managed as a single stock unit within the zone. It would be extremely unwise to bifurcate the management of these important stocks by making them de jure transboundary stocks when in fact and in existing law, they

are not. The resultant split between management authorities would be extremely inefficient and controversial. Management and enforcement would be extremely expensive.

The Magnuson Act was struck as a series of compromises which attempted to balance the interests of the fishermen of the Nation, many of whom fish in waters that may be somewhat distant from their State. The fundamental management principle for fisheries within the Exclusive Economic Zone was that regional fishery management councils would be established which are comprised of fishing industry representatives as well as fisheries officials representing the States involved in regional fisheries.

We are testifying today to request that the Congress assure our people that the system established by the Magnuson Act only ten years ago not be tampered with as an incidental impact of establishing extended national defense borders.

As users of the Nation's fisheries resources who find the existing management regime to be a reasonable approach, we argue for the status quo. However, we are realists, and knowing that the fishing industry arguments may not carry the day, we ask that if we must extend our boundaries for international purposes that the State/Federal fisheries boundaries remain as they are today.

If, however, it is necessary for a debate on the domestic issues as a result of the extension of the territorial sea, the provisions of H.R. 5069 are the best way to proceed because the status quo would prevail until all of the implications of a change in boundaries for domestic purposes would be revealed.

We sincerely appreciate and compliment you, Congressman Lowry, for introducing this legislation which does draw attention to the State/Federal law issue. Our interest is to perpetuate the regime of the Magnuson Act which has brought prosperity to the North Pacific fisheries. This necessarily includes the maintenance of the inner boundary of the Exclusive Economic Zone at three miles from the baseline.

Thank you.

Mr. LOWRY. Thank you very much, Mr. Evans. Thank you for the work of all the associations. I think there has been some darned good work done for the national interest results up there. Thank you.

Mr. Delaney.

STATEMENT OF RICHARD F. DELANEY, REPRESENTING THE COASTAL STATES ORGANIZATION

Mr. DELANEY. Thank you very much, Mr. Chairman.

I am Richard Delaney, and I am here today as a former Chairman of the Coastal States Organization. The title on the speakers' list has me as vice chairman. I just want to be clear that I've already served my dues, paid my dues as vice chairman of the group and now have the retired position as former chairman. I am still pleased to be here today to represent the organization and present our views on House Bill 5069.

I am also, by the way, the Assistant Secretary of Environmental Affairs for the Commonwealth of Massachusetts.

We have submitted written testimony, and I will just summarize our comments.

I guess the salient point that I would like to leave with the members of the committee is that we feel as coastal States that if any extension of the territorial sea is to be undertaken, whether it be 12 miles, 24 miles, or some other distance, that it should be accomplished via congressional action rather than presidential proclamation, and more importantly it should be accompanied by a comprehensive review of the existing ocean policies and legal regimes, which can be best accomplished via a National Ocean Policy Commission as proposed in your legislation.

Therefore, I am here today to enthusiastically support the legislation because it, as a package, incorporates both of those principles.

Briefly now, regarding the extension, and to answer some of the questions that you posed to us directly in your letter of invitation, we do feel that an extension of the territorial sea is a logical step for the United States to take. It is consistent with international law in that it would bring us into a consistent position with over, I believe the figure is, 104 other nations of the world.

Two, we certainly understand and support the practical and realistic need to address national security issues and to provide a mechanism to stem the tide of illegal drugs flowing into our country as would be assisted by this legislation.

Yet, our third point is that we should give very thoughtful consideration to the effect that such an action would have on the domestic law and policy particularly regarding the comments that Mr. Saxton made just moments ago about the other important goals of our Nation, and that is preserving the environmental integrity and marine water quality of our oceans and coastal waters.

We are also very concerned that if this action, the extension of the territorial sea, is attempted only through a presidential proclamation that it will lead to more problems than we already have in our system. I would offer several examples or reasons for our reluctance to endorse a presidential proclamation.

First of all, as you well know, Mr. Chairman, we have in front of your committee before stated the official Coastal States Organization position that was adopted in March of 1987 that the Coastal States have, and I quote, "direct and inherent interests, rights, and responsibilities that extend well beyond the seaward boundary". And that the protection, conservation and development of resources there often have significant impacts on the social, environmental and economic interests of the Coastal States.

We feel, therefore, that an extension of the territorial sea that does not address these domestic aspects, such as management and protection of the environment, and the need for an improved Federal/State partnership, will only further aggravate an already sometimes confusing and frustrating situation and will simply miss a fine opportunity for genuine progress on a number of fronts.

Let me just take my last couple of minutes, if I may, to respond to some of the comments that the first panel made. I heard that there were assurances that a presidential proclamation extending the territorial sea would not have an effect on existing domestic law. I would suggest that we need to only look to recent history to

the last presidential proclamation, the one that created the Exclusive Economic Zone, to see what that means in reality. I quote from the President at the time of the announcement of the EEZ proclamation. He said, "The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States Government agency."

It was shortly after that, the Department of Interior took the position that the EEZ proclamation expanded both the scope of the Outer Continental Shelf Lands Act regarding minerals and the department's jurisdictional authority. That has caused a fair amount of consternation, as you well know, to the point that you have filed other legislation, House Bill 1260, the National Seabed Hard Minerals Act, to try to resolve that issue.

I cite this as an example of how, despite the best assurances, a presidential proclamation can be taken many steps further.

I also heard the members of the first panel suggest that we need not be as concerned about a comprehensive look at ocean policy as might happen through a commission and that in fact there were existing mechanisms in place. The principal one being referred to is the Senior Interagency Group on the Law of the Sea.

I tell you, Mr. Chairman, that as far as I know, no State has been solicited or consulted by that group on any of the issues that are in front of them. I have not seen any recommendations come from that group that would suggest they are working toward the development of a holistic integrated ocean policy for this Nation and for the States. I think we need a much more effective mechanism such as the one you have proposed for achieving such a goal.

I will not go into the detail that we have in our testimony, but I will cite just one of the possible ambiguities or questions that will arise from a presidential proclamation should that be the route that is followed.

For example, in the Coastal Zone Management Act, the jurisdictional boundary for that act is "seaward to the outer limit of the U.S. territorial sea." Now, should we have an extension of the territorial sea from 3 to 12 miles, the question arises, do the States therefore extend their CZMA jurisdiction. I don't think this particular Administration or the panel before us would like to have that happen. The States of course would be very interested in maybe taking that step.

That is a very quick and simple example, and we cite others dealing with the OCSLA and Submerged Lands Act that would also raise a number of questions.

In general we feel there is no doubt that a presidential proclamation to extend the territorial sea by itself will present more problems than it will provide benefits. It will be looked upon to interpret domestic law when we have an issue or a question about it, but it would only add to the confusion in the existing regime.

So in closing I would say, Mr. Chairman, that the CSO views the enactment of legislation like House Bill 5069 to extend the U.S. territorial sea to 12 miles and the contiguous zone to 24 miles to be sensible and in the best interest of the Nation. Moreover, the Coastal States Organization views the establishment of a National Oceans Policy Commission to be an integral part of the legislation.

As a whole, the legislation is certainly timely given the advancing presidential proclamation, but even more important from our perspective, the legislation as a whole is critical to forging a new workable Federal/State partnership to effectively manage the Nation's ocean resources and activities.

Mr. Chairman, that completes my prepared remarks, and I will be glad to answer any questions the members of the committee may have.

[The prepared statement of Mr. Delaney can be found at end of hearing.]

Mr. LOWRY. Thank you, Mr. Delaney, for a very helpful statement.

Ms. Westerman.

STATEMENT OF GAYL WESTERMAN, PROFESSOR OF LAW, PACE UNIVERSITY SCHOOL OF LAW

Ms. WESTERMAN. Thank you, Mr. Chairman.

Unlike most of the speakers which have preceded me, I am not here today with a particular position of my own nor of any particular group. I presume I have been invited to attend in my capacity as a legal scholar.

I was presented four legal questions. The questions were: Is a claim to a 12-mile territorial sea lawful under international law? Does the President have the power to proclaim such an extension? Does the Congress have the power to legislate such an extension? And lastly, the most difficult of all: What will be the effect of such an extension on domestic legislation?

If I might, I am going to submit more detailed testimony, but today I will answer each of those questions in turn and then I will be available for further questioning.

As to the first question, is a claim to a 12-mile territorial sea lawful under international law; in 1982 the United Nations Convention on the Law of the Sea, Article 3, gave every State, and I quote, "the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles measured from the baselines determined in accordance with this Convention."

Although, as we all know, the Convention has not yet entered into force, certainly the high number of signatories—159 or so at last count—and the 104 States which have conformed their practice to such a rule give me the basis to make the assertion that at the current time this is customary international law, and a claim to such an extension would be lawful.

The second question is also an easy one. Does the President have the power to proclaim a 12-mile territorial sea for the United States? Unquestionably, he does.

The foreign affairs powers of the President are to a certain extent constitutional, but many would say, and I cite Professors Henkin and Corwin on this point, that the powers are extraconstitutional in that they are inherent and are derived from the attributes of national sovereignty which existed prior to the Constitution.

Although we've had a 200 year struggle between the Congress, which is also imbued with foreign affairs powers, and the President

as to who will control foreign policy, there is no question that from the eighteenth century onward the President has been termed the sole organ of the Federal Government in the field of international relations. This implies legal authority in the President and legal limitations on others in that only he and not the Congress may communicate with foreign governments. In this position the President asserts rights and assumes duties for the United States. In addition to treaties requiring the approval of the Senate, he may make international agreements on his sole authority, and he acts for the United States in the process by which international law is formed.

In doing so, he can stake out new claims for the United States, as for example the Truman Proclamation which proclaimed rights to the resources in the continental shelf. There is no question that if the President had the right to proclaim exclusive rights in this maritime area, which was not at that time considered under international law to be the norm, he certainly would have the right at this point to claim a 12-mile territorial sea which is in accord with customary international law.

I was presented a subissue on this question which I would like to address. The subissue was, can the President acquire territory for the United States without the approval of Congress? I think the question is a bit off, in the sense that the territorial sea is really not territory in the sense that I think that question may imply. Obviously if we acquire territory through occupation or proscription or conquest, we would need congressional approval to incorporate that "territory" into United States boundaries. But the territorial sea regime is part of an international regime which has been devised over time to balance the interests of coastal States and international users in common. It has nothing to do with territory in the usual sense of that term.

So, could the President act completely alone and proclaim a 12-mile territorial sea? There is no question about it.

The third question is more problematic. Does Congress have the power to declare a 12-mile territorial sea? My answer would be not without presidential collaboration. Let me explain that just a bit.

There is no doubt that Congress has power in the realm of foreign affairs and, again, this power is derived partially from the Constitution and partially from inherent powers of the national Government. Many of the powers that Congress has asserted in the realm of foreign affairs have simply accrued by practice, such as declaring what the law of neutrality would be in a particular instance, and ever since Congress has decided issues of neutrality.

I think the argument could be made and will be made that Congress has the power to legislate a 12-mile territorial sea based on a combination of their somewhat vague foreign affairs powers, the commerce power, the Article III, Section 2 grant of maritime jurisdiction to the Federal Judiciary which gives Congress the right to legislate on maritime law, as well as the property power which would certainly support congressional authority to deal with the territorial sea and its resources.

Having said this, however nothing that Congress can do will have any ultimate effect without presidential collaboration of some sort. You could pass a joint resolution directing or advising the

President to declare a 12-mile territorial sea, but we all know that he could refuse to do this. Likewise, you could pass your legislation, but without presidential approval, obviously the legislation is ineffective.

So I think the question misses the point. It seems to me that rather than ask does the Congress have the power to declare a 12-mile territorial sea, I would say that given the circumstances here, where both branches are concurrently considering such an extension, this is an opportunity for the kind of executive legislative collaboration which has worked so effectively on many issues in the past.

I would agree with my colleague, Mr. Delaney, that Congress' most important role could occur after an executive proclamation in determining the domestic issues in a forum which represents State interests certainly much better than the various Federal agencies which have spoken so far today. Clearly, the Congress can and must legislate on these domestic issues which will be raised by the declaration on the territorial sea.

Now the more difficult question is, how would such an extension affect the interpretation of domestic legislation related to the territorial sea? This is a much more complicated legal question, and the answer can't be stated at this point with any finality; but two things can be said with some certainty.

First, there appears to be no constitutional impediment to the United States declaring one boundary for international law purposes as against foreign nations and another boundary for domestic law purposes. The Supreme Court in *United States* v. *California* in 1965 declared as much by adopting the Article 7 Territorial Sea Convention's definition of a "bay" for domestic law purposes, but freezing that definition as of 1965 in case the international rule on bay boundaries should change in the future. Clearly the Court contemplated a situation in which you might have one boundary for international and one boundary for domestic law purposes.

The Restatement of the Foreign Relations Law of the United States, Section 512, the second Reporter's note, makes the same point. "States", and I quote from that section, "have long applied their laws to activities in the territorial sea. The Submerged Lands Act confirmed the area as being within the seaward boundary of the original coastal State." And this is the key provision: "But an assertion of a wider territorial sea by the United States as permitted under Section 511 in Article 3 of the LOSC would not in itself give rights in the additional zone to the adjacent States. Unless Congress determined otherwise, the zone between 3 and 12 miles would be under the exclusive authority of the Federal Government."

Frankly, I think the Reporter's note is far too conclusory. I believe that many arguments could and will be made that as the Federal extension of authority moves seaward, so should State authority. And that leads to my second statement of fact. Whether there is a legal impediment to such a dual determination or not, there will almost certainly be a political reaction of enormous proportions on the part of coastal States, similar to that perhaps which met the 1945 *U.S.* v. *California* decision which limited States' seaward authority to the land boundary of the States.

The Submerged Lands Act and the Outer Continental Shelf Lands Act constituted the congressional response to this reaction and effected the U.S. version of a constitutional settlement in coastal waters, i.e., that State authority would extend to the territorial sea limit and Federal authority would extend beyond it to the reach of the Continental Shelf.

Now given these two facts, how is one to predict the effect of such an extension on the interpretation of domestic legislation? I think the Congress is going to find itself in a situation much like that which it faced at the time of the Submerged Lands Act legislation, i.e., that they are going to be pressed for a restructuring of Federal/State resource allocation in coastal waters. I believe that the coastal States can and will make the argument that the world has changed since 1953, the Federal Government has greatly benefited from extensions out to 200 miles in the EEZ and the fishery zones. This has changed the basis for the three-mile allocation to the States.

In the face of such a likely demand, three responses seem possible. First, we could leave it to the courts and let each State proceed on its own to ask for a statutory interpretation as to the meaning of a particular legislation's territorial sea language. That might lead to the kind of judicial chaos that some of the earlier witnesses today have predicted, but as one of my colleagues at the Yale Law School has observed, that's what courts are for.

A second possible response would be to thoroughly examine, and I suppose this is what our colleagues in the Federal Government are suggesting that they are in the process of doing, to thoroughly examine, perhaps through computer analysis each and every code section which uses the language of the territorial sea, and then in each case do a thorough statutory interpretation of the statute, just like any law student would be required to do. What was the intent of the Congress? What is the clear meaning of the text? What was the purpose of the legislation? What does the legislative history reveal as to contextual understandings at the time that the legislation was passed? This type of analysis would address the Fisheries Associations' concerns over leaving a boundary for fishery purposes at a certain point and perhaps having a very different boundary for other pieces of legislation, depending on the outcome of the statutory interpretation exercise in each case.

If that kind of analysis produced a chaotic result and extreme confusion for coastal users, then I think eventually Congress may very well have to readdress the Submerged Lands Act and the Outer Continental Shelf Lands Act equation of Federal/State resource allocation.

Mr. Chairman, that ends my answers to your questions. I would be happy to answer others.

Mr. LOWRY. Thank you, Ms. Westerman, for very helpful testimony. I certainly was able to follow the first three real easy. [Laughter.]

When we got to the fourth one, I think you did an excellent job of answering it, but I'm not so sure I could comprehend it.

Ms. WESTERMAN. I told you it was a hard question.

Mr. LOWRY. I think we did get some very good answers there though to our basic question of why there is a need for the legislation. I thank you.

Mr. Archer.

STATEMENT OF JACK ARCHER, ENVIRONMENTAL SCIENCES PROGRAM, UNIVERSITY OF MASSACHUSETTS, BOSTON

Mr. ARCHER. Thank you, Mr. Chairman.

I will, with your permission, submit written testimony later.

Mr. LOWRY. Thank you. Your prepared statement will be included in the record.

Mr. ARCHER. I was asked to look at the same questions as Professor Westerman, and I have no problem at all with endorsing her responses to the first two. I don't think there is any question at all that consistent with international and customary law the United States may extend its territorial sea to 12 miles and its contiguous zone to 24 miles.

I have no problem at all vis-a-vis foreign nations with a presidential proclamation to that effect without any corollary action by the Congress.

But I do have at least a different perspective on the response to the status of this new land or this new territory between 3 and 12 miles.

In effect, and I disagree to an extent with Professor Westerman's opinion, we are declaring sovereignty. We are incorporating this ocean space into the national territory of the United States.

Now you can view it as a kind of increasing the control of a coastal State over an area, or you could take the obverse, decreasing international rights within this zone, but certainly you can also characterize it as exercising a form of ownership. As you recall, the Submerged Lands Act vests ownership and the resources of the territorial sea in the States. That is legal terminology. It is terminology of ownership. It is an assertion of or an exercise of the sovereign authority of the Federal Government over this area, and it has been relinquished or conveyed to the States pursuant to the Submerged Lands Act.

Now we did not do that when we asserted our jurisdiction over the Exclusive Economic Zone and before that over the outer continental shelf. Those rights we have always characterized as sovereign rights or jurisdiction and control over these resources. But we have made a very careful distinction and we have not asserted national sovereignty. We have not incorporated these areas as part of the national territory of the United States. That has very important international consequences.

So, therefore, if we have a proclamation that says we extend the territorial sea, what is the character of this new land? Is it Federal land? Is it public lands of the United States? The authority over the public lands of the United States is vested in the Congress, and the Congress manages and disposes of Federal lands. I think as a complementary authority to that the Congress also acquires Federal lands.

The major acquisitions in our history, to mention three examples, the Louisiana Purchase, the purchase of Alaska, the Gadsden

Purchase, were all effected by treaty, and ratified by the Senate. In certain cases proposed acquisitions of land by treaty were rejected by the Senate. In the cases that I just mentioned to you, important aspects of the acquisition were modified by the Senate in approving the treaty under consideration.

So I think there is a substantial congressional constitutional involvement in the assertion of sovereignty over the lands of the United States or extending sovereignty over additional lands, or incorporating additional lands into our national territory.

Now, you could look at this differently too. You could say that the President might issue a proclamation, as proclamations were issued respecting the continental shelf and the EEZ, and then ask the question, may, or should, or is it necessary that the Congress act to implement those proclamations.

In the case of the Truman Proclamation, Congress took the view that it was necessary to act to implement that proclamation, and I point out that it did so. It enacted the Outer Continental Shelf Lands Act which set up an entirely new regime for managing the resources of the outer continental shelf, and it passed the Submerged Lands Act which attempted to resolve the longstanding Federal/State dispute over the ownership of the resources of the territorial sea and offshore resources generally.

In the case of the EEZ Proclamation, the President took the view that implementing legislation was not necessary. I would point out, however, that there was a substantial body of existing legislation that applied to the same zone, same ocean space, the Outer Continental Shelf Lands Act, the Magnuson Act, and numerous other Federal acts.

However, some actions have been taken by Congress to implement the EEZ proclamation. The Magnuson Act was amended to assert the fishery authority within the EEZ, not within the fishery conservation zone. Congress has perceived that there are gaps in our authority to manage EEZ resources and you, Mr. Chairman have sponsored an EEZ hard minerals bill to fill such a gap.

So I think that indeed you are still acting on the principle that it is necessary for the Congress to act to implement presidential proclamations.

I would join with Professor Westerman in her point that these kinds of issues can be settled if we do have joint executive/legislative action. These issues arise when we have unilateral action—of course, it would be impossible for the Congress to act unilaterally, as Professor Westerman observed. Any action by the Congress in a bill or a joint resolution would have to be approved by the President. So there is no way for the Congress to act unilaterally.

There is a claim, however, that the President may act unilaterally with respect to domestic affairs. I am not at all convinced that that can occur.

A final point concerns the legal effects of a proclamation on our domestic resource, or ocean resource management programs and laws. Both Mr. Delaney and Professor Westerman have referred to some serious legal issues that would have to be addressed.

There are definitional issues. The most egregious issue, perhaps that is the word, is presented by the Coastal Zone Management Act and the Outer Continental Shelf Lands Act in the definition of the

terms "coastal zone" and "territorial sea". Now admittedly the CZMA defines "coastal zone" in the context of how we have defined the "territorial sea." But most Federal laws are very specific about—I will retract that statement. A number of very important Federal laws are specific about the reference to the territorial sea, the three-mile territorial sea. The Coastal Zone Management Act is not and the OCS Lands Act is not. These laws merely assert that the seaward limit of the "coastal zone" is the seaward limit of the "territorial sea" and do not further define the "territorial sea."

I can well imagine that States may argue that there is an extension of the coastal zone to 12 miles.

Then the question arises, again, what is the status of the lands within this expanded zone. If it is Federal land, if it is public land, is it excluded from the coastal zone? There is a question of whether lands leased under the OCSLA would be excluded from coastal zone—because such lands are no longer subject to the exclusive control of the Federal Government.

Finally, I would point to certain recent legal decisions such as the decision in the case of Granite Rock v. the State of California or the California Coastal Commission which held that activities, private activities on U.S. Federal lands or public lands, by developers are subject to a measure of environmental control by States. That certainly asserts the States' interests in subjecting private activities on Federal lands to State environmental permitting requirements.

Now these are some rather complicated legal issues. They cannot, in my opinion, be addressed by a presidential proclamation, and I would say that they are suitable topics or subjects for the kind of Ocean Policy Commission that you propose.

That's my oral testimony.

Mr. LOWRY. Thank you very much for also very helpful testimony.

It seems to me that you have given important testimony and reasons why on the domestic affairs questions related to this legislatively Congress should be acting. It seems to me that that's what I hear listening to this on the domestic part of it.

Within the legislation before us if we use H.R. 5069 as the starting point, can we accomplish that without an extensive going through of all of the existing laws relative to these domestic questions? Can this be written correctly within a piece of legislation to accomplish that, that would in reality be supportive or accompanying or following not too far after the Presidential Proclamation related to the national security question?

Again, I do want to state that I think it is very understandable what has happened here. The Secretary of Defense I think for some very reasonable reasons said, hey, we want to be able to extent of the territorial sea primarily because of our concern about listening devices just three miles off. They came in and started talking about that, and that made sense. I think it was probably only an after thought that there were all of these domestic questions related to that. So that's where I think we are.

Can we do this within this legislation without having to go through and rewrite all existing law?

Mr. Archer? Ms. Westerman?

Professor Westerman.

Ms. WESTERMAN. I would say no. I think you are going to need the kind of thorough going analysis that should underlie any of these kinds of decisions.

It would appear to me that we might be able to live with inconsistency in boundaries as long as a careful analysis was done as to the purpose of the act, but I don't think you will be able to make a blanket assertion.

I think what would be fatal would be in a blanket way, either an executive proclamation or in the legislation, to simply announce that you are going to hold the status quo. That would last approximately four minutes.

Mr. LOWRY. That's what I think I hear the agency group saying they are going to do. I think that's what I hear them testifying as to how they are going to handle this problem. This just demands that the status quo will be maintained.

Ms. WESTERMAN. That's right. That's impossible. That's why I would say that I don't know whether your Commission as structured is the proper forum, but I think there needs to be a legislative inquiry where coastal State interests can be represented. Otherwise, the process will have a terrible appearance of unfairness.

Mr. SAXTON. Will the gentleman yield?

Mr. LOWRY. Yes.

Mr. SAXTON. Ms. Westerman, Section 104 speaks to State law and exemption for State laws which were written prior to the enactment of this act and also international agreements being exempt. I draw from that that it would mean that laws which are currently State laws and agreements which are currently international agreements would remain subject to the three-mile limit. Is that correct?

Ms. WESTERMAN. I only just saw the bill this morning, Mr. Saxton. If I could have just a moment. Would you restate your question to me one more time?

Mr. SAXTON. Well, let me put it this way. The intention of Section 104, as I read it, is to maintain the status quo for State laws and for international agreements.

Ms. WESTERMAN. The status quo.

Mr. SAXTON. I think what you just said is that we can't do that with respect to Federal law?

Ms. WESTERMAN. I think what I am making is a practical statement that whether it is written that way in your legislation or whether it is written that way in the executive proclamation as suggested this morning, there will be a horrendous fight over this section. It almost seems Pollyanna-ish to have this section in when you know the fight that will inevitably erupt, or else I am miscalculating the coastal State interests.

Mr. SAXTON. Not being a lawyer, I understand what you are saying, but I have a hard time understanding why we couldn't justifiably do that in a way that would be upheld in court.

Ms. WESTERMAN. Well, as I say, there is no constitutional impediment to what has been done here. The Restatement of the Foreign Relations Law certainly supports the status quo. But am I mistaken, or doesn't this bill have to pass through two houses of the Con-

gress? I think when it is put to debate, it doesn't have a chance of surviving as it now reads.

Mr. LOWRY. Isn't our opportunity to do this making this statement with congressional law a lot better than with the presidential proclamation? That seems to be for sure raising the question. At least this is Congress stating within law that the status quo of the law will stay on domestic.

Jack?

Mr. ARCHER. I have one comment.

Mr. SAXTON. May I just before we move on clarify what you just said. Are you suggesting that the problem would come after we enacted such a provision exempting existing Federal laws, or are you making the point that the problem would come in trying to get a provision like that passed in Congress?

Ms. WESTERMAN. Your second point.

Mr. SAXTON. So if we were able to take care of the political problems of getting the thing passed, then you are saying that we would have a valid law which you would feel comfortable would do what we intended it to do?

Ms. WESTERMAN. Yes. But such a law would still be open to challenge in the courts.

Mr. SAXTON. Thank you.

Mr. ARCHER. There may no longer be a point to speak to, but that won't hold me back. [Laughter.]

The legal effect of the section I think is clear, and I think Professor Westerman agrees. Yes, you can preserve the status quo. However, there is inherent in this legislation the expectation that this commission is going to deal with the numerous issues, the Federal/State issues and the issues that are raised by either a presidential proclamation or indeed by this legislation itself, and that those would be addressed and resolved.

Now, if that is not the expectation and the status quo is preserved forever, then I think the kinds of difficulties that Professor Westerman is getting at, and I would second her on that, they are going to come up again and again.

As an interim measure this bill would accomplish the extension of the territorial sea and the contiguous zone for worthy causes and would allow a breathing space to address these other issues, but it is not a final resolution of these other issues.

Mr. LOWRY. Mr. Delaney.

Mr. DELANEY. Mr. Chairman, just to clarify the record further, we support the bill with the inclusion of the commission—with the understanding that it is clearly an interim. The bill must be accompanied by the National Ocean Policy Commission to address the issues that are troublesome.

The status quo is not something that we are happy with, and it may be impossible to even maintain it in reality just because of decisions that are made by agencies, as I've cited earlier. But I think the reason the way we interpret that is clearly a holding pattern until the commission can come back to the Congress with recommendations to resolve the conflicts that exist in the status quo now.

Mr. LOWRY. Thank you, Mr. Delaney, for stating very clearly what my staff kept telling me I should be entering into this conversation. Thank you.

Any further comment on that question?

Ted?

Mr. EVANS. Yes, Mr. Lowry, just one thing. I learned a lot this morning from the first panel and from this panel. One thing I thought I heard the administration say was that it might be helpful to have legislation which preserved the status quo. I didn't hear—I heard varying degrees of confidence about the effect of a proclamation on domestic law.

Indeed, we feel that a congressional declaration of a status quo would be helpful. As one who wants to preserve the status quo for the fisheries boundaries, I would also caution that the creation of a vehicle to relook at every Federal statute which could be affected by the extension of the territorial sea might in and of itself create some economic disruption and uncertainty, investment uncertainty and so forth.

So for those areas where the Congress was reasonably sure of itself in terms of what should be done, I would advocate that it so state at the time. I don't know if that's politically possible or not. But clearly our interest is in—it simply doesn't follow that because we have this international interest that requires this action that therefore the domestic things ought to follow.

Mr. LOWRY. Right. An endorsement with the statement of the Magnuson Act, that is a pretty well held thing in this Congress now as to the success.

Professor Westerman.

Ms. WESTERMAN. Mr. Chairman, could I just add to that, that the opposite is also true, that it is also not a foregone conclusion that the extension does not require a State jurisdictional extension.

Mr. LOWRY. Thank you.

I would think that if the Interagency Group had had any questions really about the need to address this and that these problems on the domestic questions cannot be taken care of simply by a Proclamation, I think this panel has offered a lot of reasons we need to be acting on this.

I want to thank you very much. We have a vote, but actually I think it comes at a time that is all right. I anticipate, if people are in agreement, that we will be having a markup on legislation soon after the break and would certainly appreciate your input in working with our staff in fine tuning this legislation.

Thank you all very much for your time.

Ms. WESTERMAN. Thank you, Mr. Chairman.

Mr. LOWRY. The hearing is adjourned.

[Whereupon, at 12:15 p.m. the subcommittee was adjourned, to reconvene at the call of the Chair.]

[The following was submitted for the record:]

I

100TH CONGRESS
2D SESSION

H. R. 5069

To establish a 12-mile territorial sea and a 24-mile contiguous zone, to establish the National Oceans Policy Commission, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 1988

Mr. LOWRY of Washington introduced the following bill; which was referred jointly to the Committees on Merchant Marine and Fisheries, Foreign Affairs, and the Judiciary

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A BILL

To establish a 12-mile territorial sea and a 24-mile contiguous zone, to establish the National Oceans Policy Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Territorial Sea and Contiguous Zone Extension Act of 1988".

SEC. 2. FINDINGS.

The Congress finds that—

(1) the manner in which the oceans and the Great Lakes are used affects the national security, transpor-

tation needs, economy, food resources, energy and raw materials needs, international leadership, and the quality of the environment of the people of the United States;

(2) it is in the interest of the United States to establish a 12-mile territorial sea and a 24-mile contiguous zone for purposes of protecting national security, enforcing United States laws on vessels operating off the coast of the United States, and conforming United States laws with evolving principles of customary international law;

(3) to effectively accomplish such purposes it is necessary to establish a framework and schedule for examining existing laws to determine what changes need to be made in existing laws to effectively implement the 12-mile territorial sea and 24-mile contiguous zone;

(4) Presidential Proclamation 5030 of March 10, 1983, which established the Exclusive Economic Zone of the United States of America and proclaimed the sovereign rights of the United States over ocean resources out to 200 nautical miles from the coastline of the United States, requires the development and implementation of a comprehensive exploration and monitor-

ing plan to adequately address the conservation and development of the zone;

(5) the work of the Commission on Marine Science, Engineering, and Resources (known as the "Stratton Commission") in the 1960's was instrumental in initially defining the structure of United States oceans policy, and led to the enactment of major ocean-related legislation and the establishment of key oceanic and atmospheric institutions; and

(6) with Federal fiscal resources expected to be severely limited at least to the end of the century, a reexamination of the Nation's oceans, Great Lakes, and atmospheric activities is needed, and a new coordinated and comprehensive national oceans policy, based on that reexamination, must be developed in order that wise use of the oceans and the Great Lakes can be implemented in a peaceful and balanced fashion.

SEC. 3. PURPOSE.

The purpose of this Act is—

(1) to establish for purposes of international law, foreign affairs, and national security purposes a 12-mile territorial sea and a 24-mile contiguous zone;

(2) to establish a commission to conduct a comprehensive examination of existing laws and propose legislation to amend such laws to effectively implement

such 12-mile territorial sea and 24-mile contiguous zone; and

(3) to utilize that commission to develop and propose to the Congress and the President a comprehensive oceans policy (including recommendations for the implementation of that policy) that will assist the Congress and the President in—

(A) developing domestic policies and laws to promote the wise use and conservation of marine resources, including Great Lakes resources;

(B) developing international policies and laws to promote the peaceful uses of the oceans and balance the interests of all nations;

(C) promoting United States leadership in marine scientific research, facilities, and technology;

(D) developing the role and capacity of the United States in the monitoring and prediction of global oceanic atmospheric processes; and

(E) appropriately allocating the responsibilities for marine and atmospheric research and marine resource understanding, conservation, management, and development among the various levels of government and the private sector and

promoting the efficient use of limited fiscal resources for such activities.

TITLE I—ESTABLISHMENT OF 12-MILE TERRITORIAL SEA AND 24-MILE CONTIGUOUS ZONE

SEC. 101. ESTABLISHMENT OF TERRITORIAL SEA.

(a) ESTABLISHMENT.—There is established a territorial sea of the United States consisting of—

(1) the ocean waters adjacent to the baseline described in section 103 to a seaward extent that is the line consisting of every point which is located on the seaward side of such baseline at a distance of 12 miles to the nearest point of the baseline;

(2) the seabed and subsoil located below such waters; and

(3) the airspace above such waters.

(b) EFFECT.—The sovereignty of the United States exists in accordance with international law over all areas that are part of the territorial sea of the United States established by subsection (a).

SEC. 102. ESTABLISHMENT OF CONTIGUOUS ZONE.

(a) ESTABLISHMENT.—There is established a contiguous zone of the United States consisting of—

(1) the ocean waters adjacent to the baseline described in section 103 to a seaward extent that is the

line consisting of every point which is located on the seaward side of such baseline at a distance of 24 miles to the nearest point of the baseline;

(2) the seabed and subsoil located below such waters; and

(3) the airspace above such waters.

(b) EFFECT.—The United States has authority to conduct activities in the contiguous zone established by subsection (a) to the extent necessary—

(1) to prevent infringement of the customs, fiscal immigration, and sanitary laws of the United States in the territory of the United States, including such infringement in the territorial sea of the United States established by section 101; and

(2) to punish infringement of such laws committed in the territory of the United States, including such an infringement committed in the territorial sea of the United States established by section 101.

SEC. 103. BASELINE DESCRIBED.

(a) IN GENERAL.—Subject to subsections (b), (c), and (d), the baseline referred to in sections 101 and 102 is the low-water line located along the seaward extent of the coastal land territory of the United States.

(b) ISLANDS.—In the case of islands of the United States situated on atolls or having fringing reefs, the baseline is the seaward low-water line of the reef.

(c) BAYS.—

(1) IN GENERAL.—In the case of a bay for which the distance between the natural entrance points at low-water is less than 24 miles, the baseline is the straight line between such points at low water.

(2) HISTORIC BAYS.—Notwithstanding paragraph (1), in the case of any bay over which the United States has exercised continuous authority and with respect to which foreign countries have acquiesced in such exercise of authority, the baseline is the straight line between the natural entrance points of such bay at low water.

SEC. 104. EFFECT ON OTHER LAWS.

(a) STATE LAW.—Except as provided in any law enacted after the date of the enactment of this Act, nothing in this title shall affect the application of the laws of a State, or the exercise of any authority by a State under Federal law, with respect to areas included in the territorial sea established by section 101 or the contiguous zone established by section 102.

(b) INTERNATIONAL AGREEMENTS.—Nothing in this title shall affect—

(1) any agreement in effect between the United States and a foreign country; and

(2) the right of innocent passage through the territorial sea established by section 101.

SEC. 105. EFFECTIVE DATE.

This title shall be effective March 10, 1989.

TITLE II—ESTABLISHMENT OF NATIONAL OCEANS POLICY COMMISSION

SEC. 201. ESTABLISHMENT OF THE COMMISSION.

(a) IN GENERAL.—There is established a commission to be known as the National Oceans Policy Commission (hereinafter referred to in this Act as the "Commission").

(b) NUMBER OF MEMBERS.—The Commission shall consist of 17 members who shall be appointed by the President in accordance with the provisions of this section not later than March 10, 1989.

(c) MEMBER QUALIFICATIONS.—The membership of the Commission shall be composed in such a manner as to provide that 14 of the members shall be appointed from the following qualification categories:

(1) 3 members shall be from private sector nonprofit organizations involved with national oceans policy (including, but not limited to, those with consumer and environmental interests).

(2) 5 members shall be from private sector commercial organizations involved with national oceans policy (including, but not limited to, those with marine transportation and living and nonliving marine resource interests).

(3) 2 members shall be Governors, not of the same political party, of coastal states in different geographical regions.

(4) 2 members shall be specialists in marine science from the academic community.

(5) 2 members shall be selected from at large, at least one of whom shall be knowledgeable in international oceans policy.

(d) NOMINEES FOR MEMBERSHIP.—(1)(A) The Majority Leader of the Senate (hereinafter in this Act referred to as the "Majority Leader") and the Speaker of the House of Representatives (hereinafter referred to in this Act as the "Speaker"), in consultation with the Minority Leader of each House, respectively, shall each prepare a list of 14 nominees for appointment to the Commission.

(B) Each list of nominees prepared under subparagraph (A)—

(i) shall contain nominees that meet the qualifications set forth in subsection (c); but

(ii) may not contain any of the same nominees.

No more than half of the nominees on each list may be members of the same political party.

(C) The Majority Leader and the Speaker shall submit the lists prepared under subparagraph (A) to the President within 60 days after the date of enactment of this Act.

(D) The President shall appoint 7 members of the Commission from the list submitted by the Majority Leader and 7 members from the list submitted by the Speaker. No more than 7 members of the Commission appointed under this paragraph may be members of the same political party.

(2) The President shall make 3 appointments to the Commission in addition to those appointed under paragraph (1). Federal officers or employees or individuals employed in the private sector are eligible for appointment under this paragraph. No more than 2 of the individuals appointed under this paragraph may be members of the same political party.

(3) The President, the Majority Leader, and the Speaker shall jointly select a Chairman and Vice Chairman of the Commission from members appointed under paragraph (1)(D). The Vice Chairman shall act as Chairman in the absence of the Chairman.

(e) VACANCIES.—Except as may be required by electoral changes, members of the Commission shall be appointed to serve until the Commission terminates under section 12.

In the event of a vacancy, a new member shall be appointed in the same manner in which the original appointment was made. In the case of the vacancy of a member appointed under subsection (d)(1)(D), the new member shall—

(1) be in the same qualification category under subsection (c) as the former member; and

(2) be appointed from a list of at least two nominees prepared by the Majority Leader or the Speaker, as appropriate.

(f) MEETING OF COMMISSION.—The Chairman or a majority of the members may call a meeting of the Commission.

SEC. 202. ADVISORS TO THE COMMISSION.

(a) CONGRESSIONAL ADVISORS.—(1) The Commission shall have 8 congressional advisors who shall advise the Commission in the formulation of findings and recommendations. Four of the advisors are Members of the Senate selected by the Majority Leader and 4 of the advisors are Members of the House of Representatives selected by the Speaker. Each congressional advisor must have knowledge appropriate to the concerns of the Commission.

(2) No more than 2 of the congressional advisors from each House may be members of the same political party.

(b) MILITARY ADVISOR.—The Chairman of the Joint Chiefs of Staff, or his designee, shall serve in an advisory capacity to the Commission.

SEC. 203. FUNCTIONS OF THE COMMISSION.

(a) PROPOSAL OF LEGISLATION AND COMPREHENSIVE POLICY.—(1) The Commission shall propose to the President and to Congress a comprehensive national oceans policy to carry out the purpose of this Act.

(2) The Commission shall develop recommendations on the international and domestic ocean policies, laws, regulations, and activities of the United States that will define and implement—

(A) the 12-mile territorial sea and 24-mile contiguous zone established by title I; and

(B) the other aspects of the comprehensive policy proposed under paragraph (1).

(3) The recommendations developed under paragraph (2) shall—

(A) address domestic (including the Great Lakes) and international marine policy issues;

(B) include any modifications in existing United States policies, laws, regulations, and practices necessary to develop efficient long-range programs for—

(i) domestic implementation of the 12-mile territorial sea and 24-mile contiguous zone established by title I;

(ii) research in marine and atmospheric sciences;

(iii) the understanding, conservation, management, and development of, marine resources, including Great Lakes Resources; and

(iv) the protection of the ocean environment;

(C) address the most appropriate allocation of responsibilities for research in marine and atmospheric sciences and for the understanding, conservation, management, and development of marine resources among Federal agencies, State and local government, and the private sector; and

(D) consider any other aspects of United States related policies, laws, regulations, and practices considered necessary by the Commission in carrying out its duties pursuant to this subsection.

(b) DEVELOPMENT OF RECOMMENDATIONS.—In developing recommendations under subsection (a), the Commission shall—

(1) review existing laws for the purpose of proposing specific legislation to amend those laws to effec-

tively implement the 12-mile territorial sea and 24-mile contiguous zone established by title I;

(2) survey and review all existing and planned ocean-related activities of Federal agencies, including those relating to navigation, marine research, national security, and the conservation, management, and development of marine resources, and the protection of the marine environment;

(3) survey and review all existing and planned marine facilities and equipment, including surface ships, undersea research vehicles and habitats, computers, oceanographic satellites, and other appropriate research tools;

(4) evaluate the relationships among Federal agencies, State and local government and the private sector for planning and carrying out the activities described in this subsection, considering areas of substantial coincidence of interest and responsibilities among the various levels of government, academia, industry, and the public interest community and other users of the marine environment, in order to enhance the efficient use of marine resources;

(5) consider Presidential Proclamation 5030 of March 10, 1983, on the Exclusive Economic Zone of the United States of America, including an examina-

tion of opportunities and the need for economic development within the exclusive economic zone which have a major impact on the coastal zone of the States and the adequacy of present laws to manage such development in such a way as to minimize conflict;

(6) consider the relationships of United States policies to the Convention of the Law of the Sea and actions available to the United States to affect peaceful collaborations between the United States and other nations, including the development of cooperative international marine programs which will facilitate opportunities for United States and foreign scientists to work together in the waters of the cooperating nations and to provide for the development of such programs in the United States; and

(7) engage in any other preparatory work deemed necessary to carry out the duties of the Commission pursuant to this section.

SEC. 204. POWERS OF THE COMMISSION.

(a) OBTAINING INFORMATION.—The Commission may secure directly from any department or agency of the United States any information it considers necessary to carry out its functions under this Act. Each department or agency shall cooperate with the Commission and, to the extent permitted

by law, furnish information to the Commission upon request of the Chairman.

(b) USE OF MAILS.—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

(c) ADMINISTRATIVE SUPPORT.—The General Services Administration shall provide to the Commission on a reimbursable basis the administrative support services that the Commission may request.

(d) CONTRACTUAL AUTHORITY.—The Commission may enter into contracts with Federal and State agencies, private firms, institutions, and individuals to assist the Commission in carrying out its duties. The Commission may purchase and contract without regard to sections 303 of the Federal Property and Administration Services Act of 1949 (41 U.S.C. 253), section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416), and section 8 of the Small Business Act (15 U.S.C. 637), pertaining to competition and publication requirements, and may arrange for printing without regard to the provisions of title 44, United States Code. The contracting authority of the Commission under this Act is effective only to the extent that appropriations are available for contracting purposes.

SEC. 205. ADMINISTRATIVE PROVISIONS.

(a) DETAIL OF PERSONNEL.—Upon request of the Commission, the head of any Federal agency shall detail any of the personnel of the agency to the Commission to assist the Commission in carrying out its functions under this Act. To the extent feasible, such detail shall be on a reimbursable basis.

(b) VOLUNTEER SERVICES.—The Commission may accept and use the services of volunteers serving without compensation, and to reimburse volunteers for travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code. Except for the purposes of chapter 81 of title 5, United States Code, relating to compensation for work injuries, and chapter 171 of title 28, United States Code, relating to tort claims, a volunteer under this subsection may not be considered to be an employee of the United States for any purpose.

(c) CONSULTANTS.—To the extent that funds are available, and subject to the rules that may be prescribed by the Commission, the Director appointed under section 9(a) may procure the temporary and intermittent services of experts and consultants under section 3109(b) of title 5, United States Code, but at rates not to exceed the rate of pay for GS–18 of the General Schedule.

(d) CONDUCT OF MEETINGS.—(1) All meetings of the Commission shall be open to the public, except when the

Chairman or a majority of the members of the Commission determine that the meeting or any portion of it may be closed to the public. Interested persons shall be permitted to appear at open meetings and present oral or written statements on the subject matter of the meeting. The Commission may administer oaths or affirmations to any person appearing before it.

(2) All open meetings of the Commission shall be preceded by timely public notice in the Federal Register of the time, place, and subject of the meeting.

(3) Minutes of each meeting shall be kept and shall contain a record of the people present, a description of the discussion that occurred, and copies of all statements filed. Subject to section 552 of title 5, United States Code, the minutes and records of all meetings and other documents that were made available to or prepared for the Commission shall be available for public inspection and copying at a single location in the offices of the Commission.

(4) The Federal Advisory Committee Act (5 U.S.C. App. 1–15) does not apply to the Commission.

SEC. 206. DIRECTOR AND STAFF OF COMMISSION.

(a) DIRECTOR.—The Commission shall have a Director who shall be appointed by the Chairman and who shall be paid at a rate not to exceed the rate of basic pay for GS–18

of the General Schedule. The Director shall be knowledgeable in administrative management and oceans policy.

(b) STAFF.—Subject to such rules as may be prescribed by the Commission, the Director may hire staff for the Commission and shall fix appropriate compensation. The hiring and compensation of the Director and staff under this section may occur without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

SEC. 207. COMPENSATION OF MEMBERS.

(a) IN GENERAL.—Except as provided in subsection (b), members of the Commission shall be paid at a rate not to exceed the basic pay for a GS–18 of the General Schedule for each day, including traveltime, during which such members are engaged in the actual performance of the Commission duties.

(b) EXCEPTION.—A member of the Commission who is an officer or employee of the United States may not receive pay for service on the Commission, but shall be reimbursed from funds authorized by this Act for travel expenses, including per diem in lieu of subsistence as may be authorized by law for persons in Government service employed intermittently.

SEC. 208. COMMISSION REPORT.

No later than 2 years after the Commission first meets, the Commission shall submit simultaneously to the President and to each House of the Congress a detailed final report regarding the comprehensive oceans policy and the recommendations required to be developed under section 202.

SEC. 209. TERMINATION OF THE COMMISSION.

The Commission shall cease to exist 30 days after the date of the submission of the final report under section 207.

SEC. 210. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated not more than $2,000,000 to carry out this Act, to remain available until expended.

TESTIMONY OF EDWARD E. WOLFE
DEPUTY ASSISTANT SECRETARY OF STATE
FOR OCEANS AND FISHERIES AFFAIRS
BEFORE THE SUBCOMMITTEE ON OCEANOGRAPHY
AUGUST 10, 1988

IT IS A PLEASURE TO APPEAR BEFORE YOU TODAY TO PRESENT THE ADMINISTRATION'S VIEWS ON H.R. 5069, A BILL TO EXTEND THE TERRITORIAL SEA OF THE UNITED STATES FROM THREE TO TWELVE NAUTICAL MILES AND THE CONTIGUOUS ZONE FROM TWELVE TO TWENTY-FOUR NAUTICAL MILES AND TO ESTABLISH A NATIONAL OCEANS POLICY COMMISSION. AS THE INTERAGENCY GROUP ON LAW OF THE SEA AND OCEANS POLICY HAS BEEN EXAMINING THIS SUMMER THE QUESTION OF EXTENSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE, THIS HEARING IS VERY TIMELY. EXTENSION OF THE TERRITORIAL SEA FROM THREE TO TWELVE NAUTICAL MILES AND THE CONTIGUOUS ZONE FROM TWELVE TO TWENTY-FOUR MILES WOULD BENEFIT THE UNITED STATES. A TWELVE MILE TERRITORIAL SEA WOULD GIVE THE UNITED STATES FULL TERRITORIAL SOVEREIGNTY OVER AN ADDITIONAL NINE MILES OF OCEAN SPACE ROUGHLY EQUAL IN AREA TO THE STATE OF TEXAS. THIS EXTENSION WOULD IMMEDIATELY ENHANCE THE NATIONAL SECURITY OF THE UNITED STATES AND COULD ENHANCE OUR DRUG ENFORCEMENT EFFORTS.

THE QUESTION BEFORE US IS HOW BEST TO ACHIEVE AND MAXIMIZE THE BENEFITS OF EXTENSION. WE RECOGNIZE THAT EXTENSION OF THE TERRITORIAL SEA WILL RAISE A NUMBER OF DIFFICULT ISSUES.

NEVERTHELESS, WE DO NOT BELIEVE THAT THE UNITED STATES SHOULD BE DENIED THE BENEFITS OF EXTENDING THE TERRITORIAL SEA SIMPLY BECAUSE IT WILL CAUSE US HARD WORK AND DIFFICULT DECISIONS. THE ADMINISTRATION APPRECIATES THE IMPORTANCE OF THIS ISSUE, RECOGNIZED BY INTRODUCTION OF THIS BILL AND THIS HEARING TODAY, AND LOOKS FORWARD TO WORKING WITH THE CONGRESS TO ACHIEVE THE FULL BENEFITS OF A TWELVE MILE TERRITORIAL SEA FOR THE AMERICAN PEOPLE.

THE TERRITORIAL SEA IS A BELT OF WATER ADJACENT TO THE COASTS OF A NATION OVER WHICH IT EXERCISES SOVEREIGNTY. THE COASTAL NATION EXERCISES THAT SOVEREIGNTY TO THE SAME DEGREE THAT IT EXERCISES IT ON LAND SUBJECT ONLY TO THE RIGHT OF INNOCENT PASSAGE AND, WHERE APPLICABLE, STRAITS TRANSIT PASSAGE FOR FOREIGN VESSELS. UNDER THE RIGHT OF INNOCENT PASSAGE SHIPS OF ALL NATIONS MAY ENGAGE IN CONTINUOUS AND EXPEDITIOUS PASSAGE THROUGH THE TERRITORIAL SEA WITHOUT PRIOR NOTIFICATION TO, OR PERMISSION OF, A COASTAL NATION. BEYOND THE TERRITORIAL SEA IS A FURTHER JURISDICTIONAL BELT KNOWN AS THE CONTIGUOUS ZONE, IN WHICH THE COASTAL NATION MAY EXERCISE THE CONTROL NECESSARY TO PREVENT AND PUNISH VIOLATIONS WITHIN ITS TERRITORY OR TERRITORIAL SEA OF ITS CUSTOMS, FISCAL, IMMIGRATION OR SANITARY LAWS AND REGULATIONS. A TWENTY-FOUR MILE CONTIGUOUS ZONE WOULD PROVIDE AN ADDITIONAL TWELVE MILE AREA IN WHICH TO ENFORCE UNITED STATES PROHIBITION ON DRUGS AND OTHER NARCOTIC SUBSTANCES.

THE UNITED STATES HAS HAD A THREE NAUTICAL MILE TERRITORIAL SEA SINCE THEN SECRETARY OF STATE THOMAS JEFFERSON FIRST ASSERTED IT ON BEHALF OF THE UNITED STATES IN 1793. IT ALSO CLAIMS A NINE MILE CONTIGUOUS ZONE BEYOND THE TERRITORIAL SEA. THESE LIMITS WERE ONCE THE INTERNATIONAL NORM.

THE UNITED STATES DID NOT RECOGNIZE THE VALIDITY OF A TWELVE NAUTICAL MILE WIDE TERRITORIAL SEA UNTIL PRESIDENT REAGAN, IN HIS OCEANS POLICY STATEMENT OF MARCH 10, 1983, WHICH ACCOMPANIED HIS PROCLAMATION OF THE UNITED STATES EXCLUSIVE ECONOMIC ZONE, STATED THAT THE UNITED STATES WOULD RECOGNIZE THE RIGHTS OF OTHER NATIONS ASSERTED IN THE WATERS OFF THEIR COASTS IN CONFORMITY WITH INTERNATIONAL LAW AS REFLECTED IN THE 1982 LAW OF THE SEA CONVENTION. UNDER CUSTOMARY LAW AS REFLECTED IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA A COASTAL NATION MAY CLAIM A TERRITORIAL SEA UP TO TWELVE NAUTICAL MILES IN BREADTH AND A CONTIGUOUS ZONE NOT TO EXCEED TWENTY-FOUR NAUTICAL MILES MEASURED FROM THE BASELINE FROM WHICH THE TERRITORIAL SEA IS MEASURED. AT PRESENT 104 COASTAL NATIONS INCLUDING MOST OF OUR ALLIES, CLAIM A TWELVE NAUTICAL MILE WIDE TERRITORIAL SEA. ONLY THIRTEEN CONTINUE TO CLAIM A THREE MILE TERRITORIAL SEA. AS THE NAVIGATION PROVISIONS OF THE CONVENTION, INCLUDING THOSE PERTAINING TO TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS AND ARCHIPELAGIC SEALANES PASSAGE, ARE NOW REGARDED AS CUSTOMARY LAW, THE

EXECUTIVE BRANCH BELIEVES IT TIMELY THAT THE UNITED STATES PROCLAIM A TWELVE NAUTICAL MILE WIDE TERRITORIAL SEA AND TWENTY-FOUR NAUTICAL MILE WIDE CONTIGUOUS ZONE.

EXTENSION WOULD BRING UNITED STATES PRACTICE INTO CONFORMITY WITH THE PREVAILING INTERNATIONAL LEGAL PRACTICE OF THE MAJORITY OF COASTAL NATIONS. IT WOULD SIGNIFICANTLY ENHANCE OUR NATIONAL SECURITY INTERESTS, PRIMARILY BY PREVENTING FOREIGN VESSELS FROM STATIONING THEMSELVES WITHIN TWELVE MILES TO GATHER INTELLIGENCE AND BY CONFINING THEIR ACTIVITIES IN THE TWELVE MILE TERRITORIAL SEA TO THE EXERCISE OF THE RIGHT OF INNOCENT PASSAGE, AND, WHERE APPLICABLE, OF STRAITS TRANSIT PASSAGE. MOREOVER, FOREIGN MILITARY AIRCRAFT WOULD BE PRECLUDED FROM OVERFLIGHT WITHIN TWELVE NAUTICAL MILES OF OUR COASTS AND FOREIGN SUBMARINES WOULD BE RESTRICTED TO NAVIGATION ON THE SURFACE. IN ADDITION, EXTENSION OF THE CONTIGUOUS ZONE OUT TO TWENTY-FOUR NAUTICAL MILES WOULD GIVE THE UNITED STATES THE ABILITY TO PROCEED AGAINST FOREIGN SHIPS ENGAGED IN DRUG TRAFFICKING OUT TO THAT DISTANCE, WHILE, AT PRESENT, WE CANNOT PROCEED BEYOND TWELVE MILES WITHOUT CONSENT OF THE FLAG STATE.

BOTH THE CONGRESS AND THE EXECUTIVE BRANCH HAVE IMPORTANT ROLES TO PLAY IN THE EXTENSION OF THE TERRITORIAL SEA. THE TERRITORIAL SEA WAS ESTABLISHED BY THE EXECUTIVE UNDER THE

FOREIGN AFFAIRS POWERS. THE INTERAGENCY GROUP ON LAW OF THE SEA AND OCEAN POLICY IS NOW DRAFTING A PRESIDENTIAL PROCLAMATION TO EXTEND THE TERRITORIAL SEA. WE ARE WORKING WITH THE DEPARTMENT OF JUSTICE TO RESOLVE A NUMBER OF UNDERLYING LEGAL ISSUES. EXTENSION OF THE TERRITORIAL SEA IS ESSENTIALLY AN EXERCISE OF AN INTERNATIONAL CLAIM OF RIGHT VIS-A-VIS OTHER NATIONS. CONGRESSIONAL ACTION COULD BE HELPFUL IN MINIMIZING THE UNCERTAINTIES THAT MIGHT BE RAISED BY THAT EXTENSION UNDER A MYRIAD OF EXISTING STATUTES. THIS MIGHT AVOID NEEDLESS LITIGATION.

IT MAY BE DESIRABLE TO ENACT LEGISLATION BASED UPON THE EXTENSION OF THE TERRITORIAL SEA AND CLARIFYING THAT THE LEGAL RIGHTS AND INTERESTS OF THE STATES ARE NOT EXTENDED AND THAT FEDERAL AGENCIES' AUTHORITIES ARE UNCHANGED. LEGISLATION COMPLEMENTING THE PROCLAMATION SHOULD STATE THAT, EXCEPT AS PROVIDED IN SUBSEQUENT LEGISLATION, THE EXTENSION DOES NOT AFFECT EXISTING STATUTORY OR REGULATORY AUTHORITIES THAT REFER TO THE UNITED STATES "TERRITORIAL WATERS," "TERRITORIAL SEA" OR "NAVIGABLE WATERS" AND THAT THESE WOULD CONTINUE TO BE INTERPRETED AND TO BE APPLIED TO MEAN THREE NAUTICAL MILES IN BREADTH. THE LEGISLATION SHOULD ALSO STATE THAT THE SEAWARD BOUNDARIES OF THE STATES WOULD NOT BE EXTENDED.

IF I MAY BRIEFLY STATE SOME OF THE ADMINISTRATION'S CONCERNS WITH H.R. 5069.

ANY EXTENSION SHOULD REFER NOT ONLY TO THE RIGHT OF INNOCENT PASSAGE THROUGH THE TERRITORIAL SEA FOR FOREIGN VESSELS AS THE BILL DOES, BUT ALSO THE RIGHT OF TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS. THIS IS A CUSTOMARY LEGAL RIGHT OF GREAT IMPORTANCE TO THE UNITED STATES THAT WE MUST ENCOURAGE WHENEVER POSSIBLE IN ORDER TO INFLUENCE THE PRACTICE OF OTHER STRAITS STATES. BY SCRUPULOUSLY INCLUDING IT IN UNITED STATES STATUTORY AUTHORITY OR OTHER INSTRUMENT EXTENDING THE TERRITORIAL SEA WE OPENLY AND OFFICIALLY ENDORSE ITS OVERRIDING VALIDITY AND UNDERSCORE IT AS A SINE QUA NON OF ANY TERRITORIAL SEA EXTENSION BEYOND THREE NAUTICAL MILES.

A SECOND CONCERN IS THAT PORTION OF H.R. 5069 WHICH ADDRESSES THE BASELINES FROM WHICH THE TERRITORIAL SEA IS MEASURED. THIS PROVISION IS UNNECESSARY. WE HAVE BASELINES AND PROCEDURES FOR THEIR DEMARCATION, ALTERATION AND PUBLICATION WHICH ARE FIRMLY ESTABLISHED IN THE GOVERNMENT'S ADMINISTRATIVE PRACTICE AND SANCTIONED TIME AFTER TIME BY THE SUPREME COURT. THIS IS NOT AN AREA IN WHICH LEGISLATION IS REQUIRED. THE UNITED STATES IS NOT ESTABLISHING A TERRITORIAL SEA AND CONTIGUOUS ZONE FOR THE FIRST TIME. INTERNATIONAL LAW SUPPLIES THE PRINCIPLES. MOREOVER, A STATUTE WHICH ADOPTED A SET OF PRINCIPLES LESS INCLUSIVE THAN THOSE RECOGNIZED UNDER INTERNATIONAL LAW AND ADOPTED INTO UNITED STATES LAW AND PRACTICE WOULD APPEAR UNWISE AND COULD LEAD TO COSTLY AND DISRUPTIVE RENEWAL OF FEDERAL-STATE LITIGATION.

ANOTHER CONCERN IS TO AVOID UNINTENDED TERRITORIAL OR JURISDICTIONAL DISPUTES. IN ANY EXTENSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE WE WOULD WISH TO MAKE CLEAR THAT IN CASES OF OVERLAP WITH THE TERRITORIAL SEA OR CONTIGUOUS ZONE OF ANOTHER NATION, THE U.S. EXTENSION WAS WITHOUT PREJUDICE TO A BOUNDARY DETERMINATION.

WITH REGARD TO THE ESTABLISHMENT OF A NATIONAL OCEAN POLICY COMMISSION, THE ADMINISTRATION BELIEVES THAT A NATIONAL OCEANS POLICY COMMISSION IS UNNECESSARY AND DUPLICATIVE OF EXISTING EFFORTS. THE COMMISSION SET OUT IN THE BILL IS CHARGED WITH A MANDATE SO BROAD THAT IT COULD RETARD THIS NATION'S REALIZATION OF THE FULL BENEFITS OF EXTENSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE. FURTHERMORE, THE COMMISSION WOULD NOT ONLY DUPLICATE THE WORK OF SEVERAL EXISTING ORGANIZATIONS AND GROUPS WHICH FOCUS ON OCEAN ACTIVITIES AND ON OCEAN POLICY IN PARTICULAR BUT ALSO WOULD BE UNNECESSARILY EXEMPT FROM PROCUREMENT STATUTES. THE PRINCIPAL GROUP CHARGED WITH OVERSEEING IMPLEMENTATION OF INTERNATIONAL OCEAN POLICY HAS BEEN THE SENIOR INTERAGENCY GROUP (SIG) ON LAW OF THE SEA AND OCEANS POLICY, CHAIRED BY THE SECRETARY OF STATE, WHICH FORMULATES MAJOR INTERNATIONAL POLICIES. THE SIG OVERSEES THE INTERAGENCY GROUP, CHAIRED BY THE ASSISTANT SECRETARY OF STATE FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, AND THE WORKING GROUP, WHICH MEETS FREQUENTLY TO

DEVELOP POLICY RECOMMENDATIONS AND CONSIDER TECHNICAL ASPECTS OF OCEANS ISSUES. ALL FEDERAL AGENCIES WITH OCEANS RESPONSIBILITIES PARTICIPATE IN THESE BODIES.

MOST OF THESE AGENCIES HAVE LONG STANDING MECHANISMS TO PROVIDE AVENUES FOR THE PUBLIC AND THE STATES TO INFLUENCE OCEANS POLICY. EACH OF THESE GROUPS HAS WELL DEVELOPED LINES OF COMMUNICATION WITH THE NON-FEDERAL INTERESTS THAT WILL BE VITAL TO IMPLEMENTATION OF THE TWELVE MILE TERRITORIAL SEA. ALL OF THESE GROUPS ARE WATCHED OVER BY THE SIG, WHICH PLAYS THE PRIMARY COORDINATING ROLE IN INSURING A COHERENT AND UNIFORM UNITED STATES INTERNATIONAL OCEANS POLICY. THE ADMINISTRATION, THEREFORE, OPPOSES ESTABLISHMENT OF THE NATIONAL OCEANS POLICY COMMISSION.

THE ADMINISTRATION STRONGLY DESIRES A CO-OPERATIVE BIPARTISAN APPROACH TO EXTENSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE. IT IS OUR INTENTION TO WORK TOWARDS A PRESIDENTIAL PROCLAMATION IN THE NEAR FUTURE CONSISTENT WITH THE OBJECTIVE OF PRESERVING THE STATUS QUO WITH RESPECT TO DOMESTIC LEGISLATION UNLESS SUCH LEGISLATIVE AUTHORITIES ARE MODIFIED IN THE FUTURE. WE ARE PREPARED TO CONTINUE TO COOPERATE WITH THE CONGRESS TO ACHIEVE THIS END.

THANK YOU, MR. CHAIRMAN.

TESTIMONY OF

DAVID G. WIGG

DEPUTY ASSISTANT SECRETARY OF DEFENSE

POLICY ANALYSIS

BEFORE THE

SUBCOMMITTEE ON OCEANOGRAPHY

COMMITTEE ON MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

AUGUST 10, 1988

I am pleased to be here today to present the views of the Department of Defense on H.R. 5069, a bill to extend the territorial sea and contiguous zone to 12 and 24 miles, respectively, and to establish a National Oceans Policy Commission. I am equally pleased to be able to tell you that the Department of Defense strongly supports the extension of the territorial sea to 12 nautical miles, and the extension of the contiguous zone to 24 nautical miles. In fact, the Department of Defense has actively participated and fully supported the coordinated effort among federal departments and agencies for a Presidential Proclamation extending the territorial sea.

Mr. Chairman, I can tell you why the Department of Defense supports this concept in just two words: national security. When we look at ocean policy and maritime claims, we consider their impact on national security from two perspectives: how do they affect our vital maritime mobility, and how do they help us

protect our coasts? If done properly, the extension of the territorial sea and contiguous zone will improve our situation on both counts.

Let me talk first about the issue of maritime mobility. As this subcommittee well knows, for nearly two centuries the United States has claimed only a three-nautical-mile territorial sea. More to the point, for much of that time, the United States had considered the three-mile territorial sea essential to preservation of the navigational rights and freedoms that are the cornerstone of our maritime mobility. In large measure, that attitude was rooted in a concern that the extension of the territorial sea by some countries would impair the ability of ships and aircraft to transit vital international straits.

However, over the course of the last two decades, and especially since the time of the Third United Nations Conference on the Law of the Sea, which began in 1974, it has become apparent that there is an international consensus on a number of important issues of maritime law and practice. One such issue is the maximum breadth of the territorial sea -- there is general agreement that 12 nautical miles is the permissible breadth, and the overwhelming majority of coastal nations now claim that breadth. But there is clear consensus that, regardless of the permissible breadth of the territorial sea, all nations enjoy the right of transit passage through, over and under straits used for

international navigation. Mr. Chairman, this means that maritime mobility has been preserved.

In recognition of that consensus, President Reagan announced, on 10 March 1983, that the United States would recognize the rights of other countries in the waters off their coasts, as reflected in the 1982 UN Convention on the Law of the Sea. In short, five years ago, we publicly accepted the proposition that other countries could claim 12-nautical mile territorial seas. By claiming a 12-mile territorial sea ourselves, we are not diminishing our own position, we are reinforcing it.

But, as you know, Mr. Chairman, there is more to claiming a territorial sea than asserting sovereignty over waters and the airspace above them -- and here is where a 12-mile territorial sea claim by the United States will actually benefit maritime mobility. We have the opportunity, Mr. Chairman, to do it right, to do it in accordance with the international legal principles reflected in the 1982 UN Convention. We can, and must, proclaim an extended territorial sea with full recognition and acceptance of the concomitant rights of all ships to transit the territorial sea in innocent passage and the rights of all ships and aircraft to transit international straits off our coasts in exercise of the right of straits transit passage. By doing so, we will demonstrate to the world -- and set an example for the world -- the continuing, vital balance between the rights of the coastal

nation and the rights of the world community in the waters off that country's shores. As a country that has both a great maritime tradition and one of the world's longest coastlines, we can and must continue to lead international practice in maintaining a proper balance between coastal and maritime rights and responsibilities.

Let me turn, then, Mr. Chairman, to the other component -- the protection of our coasts. We all know the history of the three-mile territorial sea -- the theory that three miles represented the approximate distance of a cannon shot. Times have changed, however, and the threats have changed with them. Obviously, in an era of inter-continental ballistic missiles, a country need no longer lurk within cannon-shot-range of another's shores to pose a threat to national security. But nowadays the issues are more subtle.

National security requires security of communications and security of operations. Extension of the territorial sea will help on both counts, because it will extend the area off our shores in which units of other countries may not station themselves to loiter in order to monitor our activities. Let me give you a few general examples. Despite the extensive use of highly sophisticated intelligence collection technology, much valuable intelligence is collected by use of photographic equipment. Extension of the territorial sea means that a vessel

with such cameras must loiter considerably farther offshore and, therefore, that their ability to record what's going on will be substantially reduced. Similarly, the ability of ships offshore to collect communications intelligence, especially communications that are transmitted along line of sight, will be reduced.

Mr. Chairman, I need not explain to the members of this subcommittee the importance to national security of our submarine fleet. Essential to the effective operation of the submarine fleet are the ability to move in and out of port without detection by intelligence collection vessels lying off our shores and the significant denial of collection of acoustic intelligence. You can readily see that, if a submarine has a 12-nautical-mile belt in which to operate before approaching an intelligence collector, it will have a far better opportunity to achieve these ends than if the intelligence collector is only three miles offshore.

In short, Mr. Chairman, the Department of Defense strongly supports the idea of extending the territorial sea and contiguous zone. The Interagency Working Group on Law of the Sea is drafting a Presidential proclamation to extend the territorial sea and the Group is working to resolve possible underlying legal issues. We do not favor any change in the status quo of existing statutes unless addressed in the future by the Congress.

The Department of Defense recognizes that the interplay between such a proclamation and existing laws would be clarified by legislative action to affirm that the application of existing laws will remain unchanged by such a proclamation and that only further action will change them. We look forward to working with the Congress in such a coordinated endeavor.

Permit me, Mr. Chairman, to say a few words about Title II of H.R. 5069, which would create a National Oceans Policy Commission. The Administration believes that such a commission is unnecessary and that the responsibilities that it would be given are duplicative of existing efforts. The variety of issues implicated in development of oceans policy already have adequate fora in existing entities such as the Interagency Group on the Law of the Sea. Therefore, the Administration strongly opposes Title II of H.R. 5069.

In short, Mr. Chairman, the Department of Defense fully supports the testimony of Dr. Bernthal regarding the National Oceans Policy Commission. We believe that the shortcomings of the proposed Commission militate against its creation.

Overall, Mr. Chairman, permit me to reiterate the commitment of the Department of Defense to extension of the territorial sea and contiguous zone. We look forward to cooperating with the Congress. Thank you.

TESTIMONY OF MICHAEL A. POLING
DEPUTY ASSISTANT SECRETARY - LAND AND MINERALS MANAGEMENT

House Merchant Marine and Fisheries
Subcommittee on Oceanography

August 10, 1988

I want to thank the Chairman and Members of the Subcommittee for the opportunity to present testimony on H.R. 5069. This bill would establish a 12-mile territorial sea and a 24-mile contiguous zone and a National Oceans Policy Commission to conduct an examination of existing policies and laws to implement the territorial sea and contiguous zone extensions. This extension of the territorial sea would apply to waters adjacent to the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and U.S. overseas territories and possessions.

The Department of the Interior supports the concept of extending the territorial sea from 3 to 12 nautical miles and the contiguous zone from 12 to 24 nautical miles for drug enforcement and security purposes both on an international and national level. However, we strongly oppose the National Oceans Policy Commission established in Title II of the proposed legislation.

Section 104(a) of H.R. 5069 provides that the extension of the territorial sea to 12 miles is not to "affect the application of

the laws of a State, or the exercise of any authority by a State under Federal law. . . ." It is essential that there be no uncertainty about the scope and intent of this provision. It must be explicit that all provisions of existing domestic law, both Federal and State, will continue to be administered as they are now. This means that all references to the territorial sea will continue to mean 3 geographic miles--heretofore the limit of the territorial sea-- for the purposes of domestic programs administered under Federal, State, and other statutes.

The provisions of section 104 are ambiguous. The apparent intention of this section is to limit the application of domestic laws to the existing territorial sea and not to expand those authorities to the newly established territorial sea. However, we are concerned that it falls short of this goal. The Department is currently reviewing the implications of the proposed legislation on those domestic statutes that affect our activities most directly.

We also share the Department of State's concern regarding section 103 which addresses the baselines from which the territorial sea is measured.

I would now like to turn to a discussion of Title II which establishes the National Oceans Policy Commission. The Department strongly opposes the establishment of this Commission.

Existing statutes provide us with an effective and comprehensive oceans policy which, for the most part, has stood the test of time and serves the nation well.

We believe that the magnitude of the Commissions's mandate is far too broad. It is unreasonable to expect such a Commission, within a two-year timeframe, to do all of the surveying, reviewing, and evaluating required by section 203 of H.R. 5069 and to then develop recommendations for a comprehensive oceans policy that covers every domestic and international aspect of oceans activities.

In addition, we are particularly concerned about the composition of the Commission as provided in section 201. The disproportionately low representation of Federal and State officials on the Commission would not allow for the development of a balanced oceans policy. The bill gives the Congress a substantially greater role in the selection of the Commission than it gives to the President. We believe that the President should have the authority to make appointments without being restrained by lists from the Congress. We also believe that the proposed Commission is not fully representative of Federal agencies with an interest in oceans policy in that it fails to include the Departments of the Interior, Transportation, Defense, State and Commerce and the Environmental Protection Agency.

Finally, we question why the bill exempts the Commission from many of the administrative procedures and regulations that protect against waste, fraud and abuse by granting the authority to meet in secret, the lack of a requirement that public hearings be held, or that public comments solicited.

In summary, Mr. Chairman, the Department of the Interior supports the concept of a 12-mile territorial sea and 24-mile contiguous zone provided that the domestic laws of the United States are not altered by the extension. However, we must reiterate our opposition to the establishment of the National Oceans Policy Commission. Thank you for this opportunity to present the Department's position to the Subcommittee.

STATEMENT OF REAR ADMIRAL JOSEPH EDWARD VORBACH
CHIEF COUNSEL, UNITED STATES COAST GUARD
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON MERCHANT MARINE AND FISHERIES
SUBCOMMITTEE ON OCEANOGRAPHY
10 AUGUST 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE ON MERCHANT MARINE AND FISHERIES, I APPRECIATE THE OPPORTUNITY TO SUBMIT THIS STATEMENT FOR THE RECORD CONCERNING H.R. 5069, A BILL TO EXTEND THE TERRITORIAL SEA AND CONTIGUOUS ZONE OF THE UNITED STATES.

THE COAST GUARD GENERALLY SUPPORTS EXPANSION OF THE TERRITORIAL SEA FROM 3 TO 12 NAUTICAL MILES AND THE CONTIGUOUS ZONE FROM 12 TO 24 NAUTICAL MILES. UNDER CUSTOMARY INTERNATIONAL LAW, AS REFLECTED IN THE 1982 CONVENTION ON THE LAW OF THE SEA, EVERY COASTAL STATE HAS THE RIGHT TO ESTABLISH A TERRITORIAL SEA OUT TO A MAXIMUM DISTANCE OF 12 MILES FROM ITS BASELINES, AND A CONTIGUOUS ZONE OUT TO A MAXIMUM OF 24 MILES FROM SUCH BASELINES. THE INTERNATIONAL COMMUNITY HAS DEMONSTRATED AN ACCEPTANCE OF TERRITORIAL SEA AND CONTIGUOUS ZONE CLAIMS OUT TO THESE MAXIMUM LIMITS WHICH HAVE BECOME THE ACKNOWLEDGED INTERNATIONAL NORM.

AN EXTENSION OF THE TERRITORIAL SEA TO 12 MILES WOULD HAVE A DIRECT IMMEDIATE BENEFIT TO VITAL NATIONAL SECURITY INTERESTS OF THE UNITED STATES BY RESTRICTING FOREIGN SURVEILLANCE ACTIVITIES TO AREAS OUTSIDE 12 MILES OF THE UNITED STATES COAST. THIS ACTION WOULD PROVIDE BROADER AUTHORITY FOR UNITED STATES FORCES TO RESTRICT SUCH ACTIVITIES

UNDER INTERNATIONAL LAW. THE COAST GUARD, AS AN ARMED FORCE OF THE UNITED STATES WITH SPECIFIC COASTAL DEFENSE RESPONSIBILITIES DURING BOTH PEACE AND HOSTILE TIMES, HAS A DIRECT INTEREST IN SUCH AN ENHANCEMENT OF NATIONAL SECURITY.

IN ACCORDANCE WITH CURRENT FEDERAL LAW, THE COAST GUARD IS ALSO INVOLVED WITH AND RESPONSIBLE FOR A MULTITUDE OF OCEAN-RELATED ACTIVITIES WHICH TAKE PLACE IN THE TERRITORIAL SEA AND CONTIGUOUS ZONE. THESE TASKINGS INCLUDE, NAVIGATION, MARITIME SAFETY. LAW ENFORCEMENT, AND THE PROTECTION OF THE MARINE ENVIRONMENT. AN EXPANSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE COULD HAVE A SUBSTANTIAL AND SIGNIFICANT IMPACT ON THE OPERATIONS AND REGULATORY AUTHORITY OF THE COAST GUARD DEPENDING ON THE SPECIFIC EFFECT OF SUCH AN EXPANSION ON EACH OF THE LAWS WHICH THE COAST GUARD ENFORCES. FOR EXAMPLE, WITH REGARD TO OUR WATERWAYS SAFETY REGULATORY AUTHORITY, WE WOULD GENERALLY BE ABLE TO REQUIRE VESSELS TO USE A TRAFFIC SEPARATION SCHEME OR OPERATE IN A SPECIFIC MANNER OUT TO 12 MILES OF THE COAST IF THIS DOMESTIC AUTHORITY WERE AFFECTED; WHEREAS WE ARE PRESENTLY LIMITED TO 3 MILES. ON THE OTHER HAND, THERE WOULD BE NO SIGNIFICANT INCREASE IN THE COAST GUARD'S JURISDICTION TO ENFORCE DRUG INTERDICTION LAWS BY EXPANDING THE TERRITORIAL SEA OR CONTIGUOUS ZONE BECAUSE THE GENERAL LAW ENFORCEMENT AUTHORITY OF THE COAST GUARD IS NOT TIED TO STATUTORY DEFINITIONS OF MARITIME LIMITS OR "CUSTOMS WATERS" PER SE; INSTEAD OUR AUTHORITY EXTENDS TO THE "HIGH SEAS" AND "WATERS OVER ' WHICH THE UNITED STATES HAS JURISDICTION".

THE INTERAGENCY WORKING GROUP OF LAW OF THE SEA AND OCEAN POLICY IS CURRENTLY DRAFTING A PRESIDENTIAL PROCLAMATION TO EXPAND THE MARITIME LIMITS OF THE UNITED STATES AND IS WORKING WITH THE DEPARTMENT OF JUSTICE TO RESOLVE UNDERLYING LEGAL ISSUES.

IT IS NOT ENTIRELY CLEAR WHAT EFFECT H.R. 5069 WOULD HAVE ON DOMESTIC LAW. SECTION 104, TITLED "EFFECT ON OTHER LAWS", PROSCRIBES THE EFFECT ON STATE LAW AND INTERNATIONAL AGREEMENTS BUT DOES NOT SPECIFICALLY ADDRESS THE EFFECT ON FEDERAL LAW. FOR THE SAKE OF CLARIFICATION, THE BILL SHOULD BE MORE SPECIFIC REGARDING ITS EFFECT ON FEDERAL LAW. THE BILL COULD STATE THAT THIS EXTENSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE IS NOT MEANT TO AFFECT DOMESTIC LAW. AS TO THE OTHER DOMESTIC LAW AUTHORITIES THAT COULD BE AFFECTED BY AN EXPANSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE, WE DEFER TO THOSE AFFECTED AGENCIES.

THE BILL WOULD ALSO ESTABLISH A NATIONAL OCEAN POLICY COMMISSION TO HELP REDEFINE AND DEVELOP A COMPREHENSIVE NATIONAL OCEAN POLICY, AND TO PROPOSE LEGISLATION TO IMPLEMENT THE EXPANSION OF THE MARITIME LIMITS OF THE UNITED STATES. WE STRONGLY OPPOSE THIS TITLE OF H.R. 5069. THE PROPOSED COMMISSION IS NOT NECESSARY BECAUSE THERE IS ALREADY AN EXISTING INSTITUTIONAL FRAMEWORK; THE INTERAGENCY GROUP ON LAW OF THE SEA AND OCEAN POLICY. THIS GROUP CURRENTLY ADDRESSES UNITED STATES OCEAN POLICY ISSUES IN A SATISFACTORY MANNER AND SHOULD BE ABLE TO ADEQUATELY ADDRESS ADDITIONAL MATTERS ASSOCIATED WITH EXPANSION OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE. THE COAST GUARD ACTIVELY PARTICIPATES IN THE WORKING GROUP OF THIS INTERAGENCY FORUM.

AS TO THE SPECIFIC CONTENT OF THE PORTION OF THE BILL ESTABLISHING THE OCEAN POLICY COMMISSION, WE ARE CONCERNED THAT THE BILL'S PROVISIONS FOR SELECTION OF COMMISSION MEMBERS MAY RESULT IN THE TOTAL EXCLUSION OF THOSE FEDERAL OFFICIALS CHARGED WITH IMPLEMENTING MARINE COASTAL AND OCEANIC FUNCTIONS.

WE ARE ALSO CONCERNED, IN VIEW OF THE COMMISSION MEMBERSHIP AS PROPOSED BY THE BILL, THAT THE COMMISSION WOULD BE AUTHORIZED TO SURVEY AND REVIEW CERTAIN FEDERAL AGENCY ACTIVITIES, PARTICULARLY NATIONAL SECURITY ACTIVITIES, IN THE DEVELOPMENT OF ITS RECOMMENDATIONS. HOWEVER, WE AGREE THAT THE COMMISSION SHOULD CONSIDER ANY ADVERSE IMPACT ON NATIONAL SECURITY BEFORE MAKING RECOMMENDATIONS.
FURTHER, SECTION 203(b) OF THE BILL IS FLAWED IN THAT UNITED STATES ARMED FORCES VESSELS ARE NOT EXEMPTED, FOR NATIONAL SECURITY REASONS, FROM THE COMMISSION'S SURVEY AND REVIEW.

WE ALSO OBJECT TO THE REQUIRED DETAILING OF PERSONNEL TO THE COMMISSION. FURTHERMORE, IN THE DEVELOPMENT OF RECOMMENDATIONS, THE COMMISSION IS TASKED WITH SURVEYING AND REVIEWING OCEAN RELATED ACTIVITIES OF FEDERAL AGENCIES. THE BILL IS FLAWED HERE AS WELL, BECAUSE IN MATTERS RELATING TO THE DEPARTMENT OF TRANSPORTATION THE TOPICAL ITEMS "MARITIME SAFETY" AND "LAW ENFORCEMENT" ARE NOT INCLUDED IN THE ITEMS LISTED IN SECTION 203(b)(2).

THIS CONCLUDES MY STATEMENT FOR THE RECORD ON H.R. 5069. I APPRECIATE THE OPPORTUNITY TO PRESENT THESE VIEWS FOR YOUR CONSIDERATION AND WILL UNDERTAKE TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

TESTIMONY OF

RICHARD F. DELANEY

REPRESENTING THE
COASTAL STATES ORGANIZATION

before the

SUBCOMMITTEE ON OCEANOGRAPHY
of the
HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE

August 10, 1988

Mr. Chairman and Members of the Subcommittee, I am Richard Delaney, former Chairman of the Coastal States Organization (CSO) and Assistant Secretary for Environmental Affairs for the Commonwealth of Massachusetts. On behalf of CSO, a representative association for the Governors of the 35 coastal States, Commonwealths and Territories, I appreciate the opportunity to present our views on H.R. 5069, a bill to establish a 12-mile territorial sea and a 24-mile contiguous zone, and to establish the National Oceans Policy Commission.

Extending the U.S. territorial sea and contiguous zone is a matter of far-reaching consequences to the coastal States of the United States. Among increasing reports on the possibility of President Reagan proclaiming an extension of the territorial sea, this hearing is certainly timely and appropriate. Congress, as well as the States, needs to be heard on this important issue.

Let the record show, however, that although the Administration has for several months considered this possible proclamation, no effort has been made to consult with the coastal States on the matter. We therefore appreciate, once again, Mr. Chairman, your invitation to testify today on a matter that may have far-reaching effects on domestic law, national policy, and coastal State authority.

An extension of the U.S territorial sea and contiguous zone is a logical step. More than one hundred coastal nations have established 12-mile territorial seas and 24-mile contiguous zones in accordance with the U.N. Convention on the Law of the Sea (LOS Convention). Although the United States has not signed the LOS Convention, the President has proclaimed that the United States will act in accordance with the Convention, except for the deep seabed mining provisions. CSO certainly understands the need to enhance this nation's national security and ability to stop the flow of illegal drugs into this country, both of which will be the possible result under the proposed extensions. Nonetheless, careful forethought must be given to properly consider the effects on law and policy that these extensions may cause.

First, let me emphasize that it has been the official position of the CSO since it unanimously adopted its policy position on the U.S. EEZ in March, 1987 that whether the seaward boundary of the U.S. territorial sea is 3 miles, 3 marine leagues, 12 miles, or any other distance from shore, the coastal States have direct and inherent interests, rights and responsibilities that extend well beyond these seaward boundaries. Simply stated coastal States are "home" to most users of the U.S. EEZ. Coastal States and their local governments oversee the ports, harbors, and shore space that are essential to ocean development. The protection, conservation and development of the resources beyond state territory often have significant impacts upon the social, economic and environmental interests of the coastal States. For example, our coastal States along the eastern seaboard and Gulf of Mexico are being impacted by ocean dumping occuring many miles out at sea. Thus, the issues that arise over the arbitrary division of federal and state authorities with respect to ocean resources will essentially be the same whether the territorial sea is extended or not.

The terrestrial, coastal and marine environments are one interdependent ecological system. Through the bonds of common air basins, the actions of waves and currents on the shoreline, and the effects of rivers and run-off on ocean water quality, the land and the sea are joined in an inseparable relationship. But the anticipated presidential proclamation on the territorial sea is not expected to address the need for an ocean/EEZ resource managment regime that transcends existing or proposed Federal/State ocean boundaries. In fact, CSO is concerned that a relatively simple extension of the territorial sea for national security and law enforcement purposes, without acknowledging the need to pursue a new federal/State ocean management regime may actually hinder progress in this area. For this reason alone, Mr. Chairman, the CSO supports H.R. 5069, when compared to a stand-alone presidential proclamation.

Congressional Legislation Required

CSO believes that in order for a proclamation to have affect on domestic law, Congress must act to implement the proclamation. In 1953, the House Judiciary Committee was "of the opinion that legislative action is necessary to confirm and give validity to" President Truman's 1947 OCS Proclamation, and that it was "necessary that the Congress make such an assertion in behalf of the United States." CSO believes that the 1947 position of the House Judiciary Committee holds true today for any prospective presidential proclamation extending the U.S. territorial sea and contiguous zone.

It is clear that the President has the constitutional power to proclaim an extension of the U.S. territorial sea and contiguous zone *vis a vis* the international community pursuant to his foreign affairs authority. Should this be done, it would require all other nations, their citizens and vessels, to recognize the new territorial sea and contiguous zone boundary. But as for making the new boundaries "the law of the land" *vis-a-vis* the citizens of the United States, it is our opinion that "legislative action is necessary to confirm and give validity to" any presidential proclamation extending the U.S. territorial sea and contiguous zone.

The CSO has expresed this same position towards the EEZ Proclamation. It is our view that the EEZ Proclamation had no effect on domestic law or federal agency jurisdiction. Indeed, the President states this in the policy statement accompanying the EEZ Proclamation by saying, "The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States government agency."

Nonetheless, the Department of the Interior has taken the position that the EEZ Proclamation expanded both the scope of the Outer Continental Shelf Lands Act, and the Department's jurisdictional authority. "The Presidential assertion alone is sufficient to bring such submerged lands within the jurisdictional provision of the OCSLA" (Opinion of the Interior Department Solicitor, May 30, 1985). Thus, the Interior Department asserts authority, by virtue of the OCSLA as modified by the EEZ Proclamation, over minerals within the U.S. EEZ but not on the continental shelf, even though the President stated that his Proclamation "will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf." Not to be deterred, however, the Interior Department on July 5 finalized regulations under the OCSLA for hard mineral prospecting throughout the entire EEZ.

These same regulations, as the Chairman and several members of the Subcommittee know, have generated much controversy concerning the Interior Department's authority over marine mining in the U.S. EEZ. The regulations have also been a primary factor in the introduction of legislation -- the National Seabed Hard Minerals Act -- which has been approved by this Subcommittee and the full committee.

Mr. Chairman, besides questioning the legality of the Interior Department rulemaking, we raise this matter as an example of the confusion that may occur if congressional legislation "confirming and giving validity to" a presidential proclamation is not enacted., Legislation implementing a presidential proclamation extending the U.S. territorial sea, in addition to the U.S. EEZ Proclamation, not only is legally required in our opinion, but highly desirable. It would provide the necessary clarity and understanding of intent and reduce the likelihood of misinterpretation and litigation.

Interpretational Problems Arising From a Proclamation

Although a presidential proclamation cannot directly amend or alter domestic legislation, a proclamation is often considered whenever domestic legislation must be interpreted. Thus, issuance of a territorial sea proclamation without enacting legislation like H.R. 5069, will doubtlessly raise foreseeable, yet bedeviling problems of interpretation of domestic law.

For example, since the term "coastal zone" is defined by the Coastal Zone Management Act (CZMA) as extending, "seaward to the outer limit of the United States territorial sea," it could be interpreted that a presidential proclamation to extend the territorial sea would automatically extend a state's coastal zone seaward boundary. Given this Administration's position over the past several years to limit state CZMA consistency authority entirely within its coastal zone, it would be reasonable to assume that coastal States would actively seek such an interpretation of the presidential proclamation. However, this interpretation would certainly not be universally accepted to say the least, and could become the subject of legislation or litigation.

exing question that arises is, would the OCSLA apply to
elt of submerged land within the new territorial sea?
ies to submerged lands "seaward and outside" of state
s, and which "appertain to the United States and are
s jurisdiction and control." Land within the territorial
: United States is not land that "appertains to the United
is the United States. Further, the congressional intent
, was to enact legislation granting the United States
n and control over submerged lands outside of its
Otherwise, President Truman need not have issued his 1947
mation.

OCSLA does not apply within an extended territorial sea,
ecessarily follow that the 1920 Minerals Leasing Act (1920
s? The question as to whether submerged lands were within the
: the 1920 MLA was directly considered by the federal courts.
applicants had applied to the Department of the Interior under
20 MLA, for oil and gas prospecting permits and leases. The
or Department denied their applications. The federal courts
d Interior's denial for one reason: lands beneath the "marginal
were not "public lands." The courts reasoned that the submerged
; were not "pulic lands" because they were not subject to sale or
r disposal by the general laws of the United States, nor were they
veyed.

After extending the territorial sea by presidential proclamation,
wever, these submerged lands, being lands within the territory of
ie United States, may very well be considered "public lands." If so,
his new belt of submerged lands would be "subject to the sale or
other disposal under general laws." Further, given todays advanced
technology, surveying these submerged lands presents no great
difficulty, nor would the federal government be without legal
authority to survey land that would clearly be "property of the United
States." Thus, if the OCSLA did not apply to the submerged lands
territorial sea, which is the case today, and a
the question of whether the 1920 MLA
holding may very well be that

The Magnuson Fishery Conservation and Management Act (FCMA) defines the landward boundary of the Exclusive Economic Zone, for purposes of the FCMA, as "a line coterminous with the seaward boundary of each of the coastal States." Thus, with an extended territorial sea, for purposes of the FCMA, the EEZ would actually overlap the U.S. territorial sea. This would be an odd situation, provided that the LOS Convention defines an EEZ as "an area beyond and adjacent to the territorial sea."

Mr. Chairman, our intent here is not to argue with conviction that any of these statutory interpretations would prevail after a territorial sea proclamation is issued. Our point is that without clear congressional action accompanying and implementing such a proclamation, confusion, delay, expense, or even litigation most certainly will be the result.

Compounded Confusion: A Call for a National Commission

The issuance of a second presidential proclamation concerning U.S. territory and jurisdictional rights in the oceans will only serve to compound the confusion that presently exists due to the issuance of the 1983 EEZ proclamation. Given the issuance of two ocean proclamations, a great number of complex questions and issues will surface with respect to the proclamation's effect on domestic law and the role of state government in ocean resource management. These questions and issues, which would cut across myriad congressional committee jurisdictions and federal agency authorities, can only be realistically addressed by the proposed National Oceans Policy Commission.

Mr. Chairman, CSO supports the enactment of legislation like H.R. 1171, that would establish a National Oceans Policy Commission, and supports the purposes and need for the legislation as described in House Committee Report 100-300. We presented testimony before this committee stating that H.R. 1171 "is an investment in good government

and policy-making for the future use of our oceans" and that, "the legislation is needed now more than ever." We were certainly pleased therefore when the House of Representatives passed the legislation by a resounding margin last September. We are concerned, however, about the timeframe for submittal of the Commission's report to the President and to the Congress. Given the urgency of various ocean and coastal matters, we suggest that the 2-year timeframe to prepare the report be reduced as much as possible. Even a one year timeframe in our opinion appears to be reasonable.

It should be pointed out that in testimony before this Subcommittee in May of 1987, representatives of federal agencies stated that H.R. 1171 would "duplicate the work of several already existing organizations and groups", and branded the legislation as "unnecessary." There are definitely a significant number of federal agencies involved in ocean research/management. But we fail to see how this patchwork of agency jurisdictions and individuals can be construed as the bedrock of a comprehensive ocean policy for this Nation.

From the coastal State perspective, these current group arrangements offer little, if any, opportunity for the States to play a meaningful role in developing national ocean policy. Nor do these arrangements provide for a comprehensive, coordinated federal approach to ocean resource management. Possibly the opposition to H.R. 1171 by federal agencies arises from a fear of how the several and often separate federal marine missions and institutions will hold up under a close scrutiny by the proposed Commission.

Further, as some of the examples we have presented suggest, a comprehesive and thorough technical review of all 50 titles of the United States Code needs to be conducted in order to conform both the EEZ Proclamation and the territorial sea proclamation with the policies and requirements of the entire body of U.S. law. This is a task, we believe, that can and must be accomplished through the proposed National Oceans Policy Commission.

CONCLUSION

In closing, Mr. Chairman, CSO views the enactment of legislation like H.R. 5069 to extend the U.S. territorial sea to 12 miles and the contiguous zone to 24 miles, to be sensible and in the best interest of the nation. Moreover, the CSO views the establishment of a National Oceans Policy Commission to be an integral part of the legislation. As a whole, the legislation is certainly timely given the advancing presidential proclamation. But even more important from our perspective, the legislation, as a whole, is critical to forging a new, workable federal-state partnership to effectively manage the nation's ocean resources and activities.

Mr. Chairman, that completes my prepared remarks. I would be glad to respond to any questions you or other Members of the Subcommittee may have.

East-West Center

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August 5, 1988

Congressman Mike Lowry
Chairman, Oceanography Subcommittee
U.S. House of Representatives
Washington, D.C.

Dear Mr. Chairman:

I am very sorry that I was not able to accept your invitation to appear before your subcommittee at your August 10 hearing on your legislation to extend the territorial sea and the contiguous zone of the United States.

Extension of the territorial sea and contiguous zone is both timely and appropriate, in my judgement. The only other large maritime nation not to have broadened its territorial sea long ago was the United kingdom and the U.K. acted last year to extend its territorial sea to 12 miles.

But, as your legislation suggests, this action, especially when coupled with the 1983 proclamation of 200-mile exclusive economic zones for the U.S., will vastly complicate the already troubled maritime jurisdictional "landscape" of our nation. Even before President Reagan took his 1983 action, conflicts were on the increase between the coastal states and the federal government concerning the management of ocean activities. Clearly, the earlier designation of the 200-mile zone and the pending broadening of the territorial sea and contiguous zone will worsen the situation.

The proclamation of a U.S. EEZ was an action aimed at the international community and while it raised serious state-federal concerns, it did

nothing to address them. Similarly, an extension of the U.S. territorial sea to 12 miles will be an action taken, in the first instance, for international purposes but again this action has a great potential for impacting the coastal states in many ways.

Hence, Mr. Chairman, the linking these actions to the creation of a national ocean policy commission is abolutely essential. We need now to have a serious study of the domestic ramifications of these actions. For example, some of us believe that the seeds of opportunity exist in these jurisdictional changes — that they open the way for a new, more equitable and more functional scheme of ocean governance for the United States. But benefits such as these will only come through the hard work and diligent study of a group such as is envisioned in the national ocean policy commission provisions of your legislation.

I hope very much that you and your subcommitte are successful in moving this very important piece of legislation.

Warmest personal regards.

Sincerely,

Bob

Robert W. Knecht

Testimony of
Dr. Gayl S. Westerman

Committee on Merchant Marine & Fisheries
Subcommittee on Oceanography

Hearing on H. R. 5069
The Territorial Sea and
Contiguous Zone Extension Act of 1988

August 10, 1988
Washington, D.C.

Mr. Chairman, Committee Members and Staff:

I am pleased to submit my answers to the four questions presented to me, which were as follows:

1) Is a claim to a 12-mile territorial sea lawful under international law?

2) Does the President have the power to declare a 12-mile territorial sea for the United States?

3) Does the Congress have the power to declare a 12-mile territorial sea for the United States?

4) How would this extension affect the interpretation of domestic legislation related to the territorial sea?

My answers are based on my opinions as a legal scholar, and do not represent the views of any particular group. I am a Professor of Law at Pace University School of Law in New York, and I was a Visiting Lecturer in Law on Maritime Boundary Delimitation at the Yale Law School during the spring semester of this year. My legal scholarship has focused on the Law of the Sea, especially as it relates to federal/state boundary controversies.

1. Is a claim to a 12-mile territorial sea lawful under international law?

Yes.

In 1982, the United Nations Convention on the Law of the Sea, Article 3, gave every state "the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."

Although the Convention has not yet entered into force, a significant enough number of signatories have approved the 12-mile provision (159) and a large enough number of states have conformed to the practice at the current time (104) to make the assertion that the provision has obtained the status of customary international law.

2. Does the President have the power to declare a 12-mile territorial sea for the U.S.?

Yes.

The Foreign Affairs powers of the President are to a certain extent Constitutional,[1] but some would say[2] that these powers are extra-constitutional, i.e., they are inherent powers

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[1] See U.S. Constitution, Article II, which vests all executive power in the President

[2] See, e.g., U.S. Supreme Court Justice Sutherland, in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

derived from those attributes of national sovereignty which existed prior to the Constitution.

Edward Corwin has said, in The President: Office and Powers 1787-1984, that the Constitution is an invitation to struggle for the right to direct American foreign policy. In this struggle, the President has been seen to have certain advantages over the Congress. (The executive branch is always in session, has a greater potential for secrecy, etc). Thus, although the Congress is also imbued with certain powers in the area of foreign affairs, the balance over the last 200 years of practice has given the President the lion's share of foreign affairs power.

From the 18th century forward, the President has been termed the "sole organ" of the federal government in the field of international relations. This implies only he, not Congress, may communicate with foreign governments.

The President asserts rights and assumes duties for the United States. In addition to treaties requiring the consent of the Senate, he also makes international agreements on his sole authority, and he acts for the United States in the process by which international law is formed. He may stake out new claims for the United States, for example, the Truman Proclamation, which proclaimed the right of the United States

to exploit the mineral and other resources of the Continental Shelf.[1] There is no question, therefore, that the President has the power to proclaim a 12-mile territorial sea in accordance with customary international law.

As to the sub-issue posed, whether or not the President can acquire new territory for the United States without the approval of Congress, such approval might be needed in the more customary sense of the word "territory", i.e., when the United States acquires new territory by discovery, occupation, or prescription. But coastal waters are not "territory" in this sense. When the United States extends its territorial sea, it is not acquiring territory. It is merely extending a claim of right under an international regime, the purpose of which is to divide the oceans equitably between coastal states and international users in common.

3. Does Congress have the power to declare a 12-mile territorial sea?

Perhaps, but certainly not without Presidential collaboration.

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[1] See Pres. Proc. No. 2667, September 28, 1945, 10 FED. REG. 12303 (1945).

There is no doubt that Congress has some power to act in the realm of foreign affairs. Again, this power is derived partially from express grants of power in Art. I, in areas such as the war power, the treaty power, and others; but Congress also possesses certain inherent powers, derived from the status of Congress as one of the political branches of the national government. A number of the powers of Congress in the area of foreign affairs, such as the power to declare neutrality, have simply accrued in practice.

The argument could certainly be made that Congress has the power to declare a 12-mile territorial sea based on a combination of:

1) its none-too-clear foreign affairs powers;

2) the commerce power;

3) the Art. III, Sec. 2 grant of maritime jurisdiction to the federal judiciary, under which Congress can legislate maritime law[4] and,

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[4] See United States v. Bevans, 3 Wheat. 336 (U.S. 1818); The Propeller Genesee Chief V. Fitzhugh, 12 How. 443 (U.S. 1851); Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917).

(4) the property power, which would also support Congressional authority to deal with the territorial sea and its resources. [1]

Having said this, however, one would then have to ask what such Congressional action would really amount to without the President's collaboration?

Congress could pass a joint resolution directing or advising the President to declare a 12-mile territorial sea; and if he did so in response, fine. But there is no question that he could also refuse to do so. In that case, the resolution would have no effect except as an expression of public opinion. Likewise, Congress could pass legislation declaring a 12-mile territorial sea. But again, without the President's approval, to what end? Of course, Congress could override a President's veto, and he would then be required to faithfully enforce the law as passed.

But rather than pose the question in these terms, "Does Congress have the power to declare a 12-mile territorial sea?", I would suggest that given the circumstances of both branches concurrently considering such an extension, this is an opportunity for the kind of Executive-Legislative

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[1] See United States v. California 332 U.S. 19 (1947); Alabama v. Texas, 347 U.S. 272 (1954).

collaboration which has worked so effectively on many issues in the past. Certainly, once the President has proclaimed an extension to 12 miles, the Congress can, and in fact must, legislate in regard to the domestic issues raised by such a declaration. It would seem to this observer that, rather than devote legislative effort to the declaratory part of the extension process, as represented by HR 5069*, Congressional efforts could more profitably be directed at the study of the effects of such a declaration on the federal/state constitutional settlement in offshore waters, represented by the Submerged Lands Act, the Outer Continental Shelf Lands Act, and other relevant federal and state legislation, as well as at the provision of a more proper forum for the airing of government and coastal state concerns in this area than is likely to be provided within the various agencies of the executive branch.

4) How would such an extension affect the interpretation of domestic legislation related to the territorial sea?

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* Several sections of the bill as presently drafted seem to represent an unnecessary overlap in legislative/executive function. For example, certain sections purport to define baseline policy and rules which are well-established features of United States foreign policy, overseen by the executive branch. There is no reason to put these rules and policies into legislation, which may only delay the future revision of such policies when circumstances dictate.

This is a complicated question, the answer to which cannot be known at this time. Two statements can be made with some certainty, however.

1) There appears to be no constitutional impediment to the United State declaring one boundary for international law purposes as against foreign nations and another boundary for domestic law purposes.

The Supreme Court in United States v. California, 381 U.S. 139 (1965), declared as much by adopting Article 7 of the Geneva Convention on the Territorial Sea and the Contiguous Zone[7] as the appropriate definition of a bay for domestic law purposes, but freezing that definition domestically as of 1965 in case the international rule on bay delimitation should change in the future.

The Restatement of the Law of the Foreign Relations of the United States, Section 512, Reporter Note 2, makes the same point, to wit:

> States have long applied their laws to activities in the territorial sea. The Submerged Lands Act confirmed the area as

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[7] Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force for the United States Sept. 10, 1964).

> being within the seaward boundary of the original coastal state. But an assertion of a wider territorial sea by the United States as permitted under Section 511 and Art. 3 of the LOSC would not in itself give rights in the additional zone to the adjacent states. Unless Congress determined otherwise, the zone between 3 and 12 miles would be under the exclusive authority of the Federal Government.

Frankly, I think this statement is <u>far</u> too conclusory and deserves only the limited consideration ordinarily accorded a Restatement as a reflection of current law in a given area. Many arguments can and inevitably <u>will</u> be made that such an extension of federal authority must likewise increase state authority; and that leads me to my second statement:

2) Whether there is a <u>Constitutional</u> impediment to a dual boundary or not, there will almost certainly be a political reaction of enormous proportions on the part of the coastal states, similar to that which met the 1945 <u>United States v. California</u> decision which limited a state's seaward authority to the ordinary high-water mark, or land boundary. The Submerged Lands Act and the Outer Continental Shelf Lands Act constituted the Congressional response to this reaction, which effected the U.S. version of a Constitutional settlement in coastal waters between state and federal interests, i.e., state authority to the margin of the territorial

sea, and federal authority to the outer limit of the continental shelf.

Given these two factors, how is one to predict the effect of such an extension on the interpretation of domestic legislation?

I predict that upon the President's declaration of the extension, or the approval of a similar Bill, Congress will find itself in a situation much like that which pertained prior to the passage of the Submerged Lands Act, being pressed for a restructuring of federal-state resource allocation in coastal waters. Certainly the argument can and in all likelihood will be made that the world has changed greatly since 1953. The Federal Government has also profited greatly from the now - customary 200-mile Fishery and Exclusive Economic Zones. This has changed the basic equation used in making the original 3-mile allocation to the states.

In the face of such a likely demand, several Congressional responses seem possible:

1) The first option would be to do nothing at the legislative level and let the statutory interpretation functions be taken over by the judiciary, with each coastal state or each region

of states presenting its claim to follow the federal extension to 12 miles under their particular statutory rights in the "territorial sea".

2) The second option, and I believe the best, would be to thoroughly examine, perhaps through computer analysis of code sections, each and every case in which the language "territorial sea" is used in relation to state authority. The question, in each case, then becomes one of basic statutory interpretation, i.e., What did Congress intend by the use of this language? What is the clear meaning of the text? What was the purpose of the legislation? What does the legislative history reveal as to the contextual understanding at the time of the legislation?

There is simply no way to assert at this point that in every case, the intent of Congress was that the meaning of "territorial sea" was to be restricted to the then-current 3-mile limit, nor that in all cases "territorial sea" was used in an elastic sense, to be adjusted seaward with any new federal claim. Only when the kind of thorough analysis proposed has been completed, will Congress be in a

position to make a determination as to the effect of the federal extension on domestic legislation in any particular case.

Perhaps this method of proceeding is contemplated within the HR 5069 provision related to the establishment of a Commission to study the effects of an extension to 12 miles. If so, I would strongly support some sort of Congressional forum for such a study for reasons stated above, i.e., to provide a more democratic venue than can be provided in the Justice Department or other federal agencies, where perhaps the fact but certainly not the appearance of fairness to state interests can be provided. I would suggest, however, that the size of the Study Commission be reduced, that it be supported by experts in ocean as well as legal matters, and that the study period be reduced to a six-month maximum. Coastal states and private interests may respond favorably to a holding period in which the status quo is maintained, but only if the period is a commercially reasonable one.

3) After the analysis proposed above has been completed, Congress may be able to make the determination that language related to the

territorial sea in each separate piece of legislation analyzed can be interpreted in the same way in re: state interests. It seems equally, or perhaps more, likely that due to differing purposes and understandings of the parties in each case, such a determination is not possible, resulting in different boundaries being set for different legislative purposes. This result will either be tolerable to ocean users, or the resultant confusion may outweigh any benefits likely to accrue. If so, the third option may well present itself: Congress will have to address the Submerged Lands Act/Outer Continental Shelf Lands Act equation anew in light of changed circumstances.

Respectfully submitted
September 15, 1988,

Dr. Gayl S. Westerman
Professor of Law

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The Honorable Mike Lowry
Chairman, Subcommittee on Oceanography,
Merchant Marine and Fisheries Committee
House of Representatives
Washington D.C. 20515

Dear Mr. Chairman:

On August 10, 1988, I testified before the Committee on Merchant Marine and Fisheries concerning H.R. 5069, a bill to extend the territorial sea and contiguous zone. I am sending you this letter to clarify my response to a question that Mr. Saxton asked during the hearing.

During the hearing Mr. Saxton pointed out that the bill claimed sovereignty over the airspace above the extended territorial sea and contiguous zone, as well as control over the seabed and subsoil, and asked Mr. Wigg, Deputy Assistant Secretary of Defense, Policy Analysis, U.S. Department of Defense, if this was different than our current practice. Mr. Wigg responded that it would be different in that the extension of the contiguous zone would be on the surface beyond 12 miles (transcript, page 46). Subsequently, in a follow-up to this question asked of Mr. Wigg, Mr. Saxton asked me, relative to the air space, if the proposed bill would be consistent with international law (transcript, page 49).

Unfortunately, I did not correctly hear the question. I thought the question was whether the proposed Presidential Proclamation was consistent with international law. Accordingly, my response was correct with regard to the proposed Presidential Proclamation since international law provides for a 12 mile territorial sea and a 24 mile contiguous zone (transcript, pages 49-50). However, I did not answer the question asked by Mr. Saxton as to whether the proposed bill would be consistent with international law. I would like to clarify the record by responding in this letter to the question asked by Mr. Saxton.

The proposed bill claims sovereignty over an extended territorial sea and contiguous zone. Under customary international law a coastal State may exercise its sovereignty to an adjacent belt of sea, described as its territorial sea out to a limit not to

exceed 12 nautical miles. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. Accordingly, the portion of the bill proposing to expand the sovereignty over the air space above an extended territorial sea is consistent with international law. However, the proposed bill is defective with regard to extending a contiguous zone consisting of the seabed and subsoil located below such waters and the airspace above such waters. Under customary international law as reflected in Article 33 of the 1982 United Nations Convention on the Law of the Sea, a coastal State may establish a contiguous zone contiguous to its territorial sea, in which the coastal state may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. Accordingly, it would be inappropriate for the bill to provide for jurisdiction regarding the airspace above, or the seabed and subsoil below, a contiguous zone.

I appreciate the opportunity to clarify my testimony regarding these issues.

Sincerely,

J. E. VORBACH
Rear Admiral, U.S. Coast Guard
Chief Counsel

Copy: The Honorable Norman Shumway

International Association of Fish and Wildlife Agencies

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444 North Capitol St. NW, Suite 534, Washington, DC 20001 (202) 624-7890
Jack H. Berryman, Executive Vice President

August 9, 1988

The Honorable Mike Lowery, Chairman
The Subcommittee on Oceanography
Room 541 House Annex II
Washington, D.C. 20515

Dear Mr. Chairman:

This Association is in the process of reviewing the impacts of HR 5069, a bill to establish a 12 mile territorial sea and a 24 mile contiguous zone, to establish the National Ocean Policy Commission, and for other purposes.

Because of the complexity of the issues this may raise for state fish and wildlife resource management agencies and the short notice we have had to study the proposals, we cannot, at this time, make substantive comments. We are interested in the establishment of a National Oceans Policy Commission and hope that a state agency member of this Association will be able to participate in the Commission in behalf of states' resource concerns. In addition, we request that the record be held open until September 7, 1988 so that our coastal state member agencies may comment.

If we may be of assistance to you or your staff, as our Marine and Estuarine and International Affairs Committees review the proposals, please do not hesitate to contact us.

Sincerely,

Gordon C. Robertson
Legislative Counsel

cc: Mr. Gordon Colvin
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